

IBA GLOBAL INSIGHT

Dec 2013/Jan 2014

IBA Annual Conference Boston highlights:

**Former Fed Chairman Paul Volcker
on corruption and the rule of law**

**Twenty-first century slavery:
IBA focuses on people trafficking**

**Former CIA and NSA General
Counsel on terrorism, security
and civil liberties**

Madeleine Albright

**How the international system must change to
tackle new realities and non-state actors**





The New Global.

Lex Mundi member firms deliver the resources you need to do business in today's global marketplace.

It's not just where you do business.

It's what you know, who you know and how to get it done.

Lex Mundi member firms deliver local knowledge and experience where you are today and where you're going tomorrow. With preferred access to 21,000 lawyers in more than 100+ countries around the world, we help you get down to business wherever you do business.

Get ready to take on the world with our World Ready network of 160 top-tier member law firms.

Lex Mundi — the law firms that know your markets.

LexMundi
World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

Locate a Lex Mundi Member Firm at: www.lexmundi.com/lexsearch2.

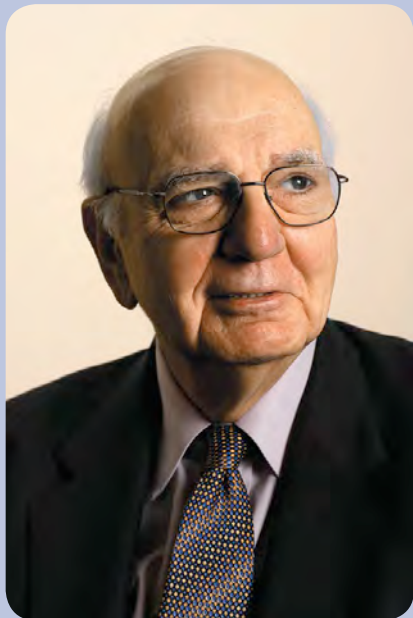
Contents

DECEMBER 2013/JANUARY 2014 Vol 67 No 6 ISSN 2221-5859



the global voice of
the legal profession®

IBA Global Insight: features



16 Madeleine Albright

The former US Secretary of State reflected on her 'worst day' and the need for the international system to respond to non-state actors and new realities during her IBA Annual Conference keynote address.

23 Paul Volcker: corruption and the rule of law

The former Fed Chairman emphasised the effects of corruption on business, human rights and democracy, insisting that the legal profession must actively defend against it to avoid complicity.

51 Poverty post-financial crisis: the rule (and role) of law

With input from high-level experts and Nobel laureates, the second phase of the IBA's Task Force on the Financial Crisis re-envisages the role of the legal profession in fighting global poverty.



32 Battling conflict

Armed groups rely on precious minerals to fund violence and, in 2010, US legislation aimed to break this connection. *Global Insight* reports on a European law that aims to go even further.



42 Twenty-first century slavery

As the IBA makes human trafficking a Presidential priority, *Global Insight* explores the world's second largest criminal industry, affecting over 600,000 men, women and children every year.



IBA Global Insight is available in the App Store

DOWNLOAD THE LATEST ISSUE TODAY

The *IBA Global Insight* app is available to read on your Apple iPad, any iOS device and now any Windows 8 device. As well as making the magazine accessible from anywhere, it carries extra features including videos, photographs and links that are not published in the printed version. The app is available through the App Store and Windows Store as a free download. Simply search for 'IBA GI' to start receiving *IBA Global Insight* wherever and whenever you like. For further information, please contact editor@int-bar.org or visit the website at www.ibanet.org. You can also use the QR code printed here to link directly to the App Store page.

AppStore



Windows 8



NOW available for Windows 8



Contents

Regulars

3 From the Editor

4 News



US and world's legal profession must address serious governance failings, says Paul Volcker; former NSA legal chief: US surveillance requires greater transparency; calls for Turkish arbitration centre as region's influence grows.

9 Human Rights News



Guantánamo: US government advisers on future of the controversial detention camp; investigator condemns 'insurmountable obstacles' in UN drone inquiry; Sri Lanka bans human rights delegates from major Commonwealth meeting.

Comment and Analysis

USA: US government shutdown



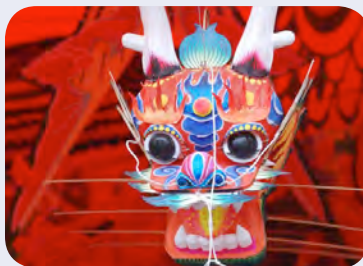
29 The shutdown has damaged America's reputation globally. But the abject governance failure, with its widespread human rights consequences, is likely to be repeated in a matter of months.

Africa: After colonialism and the dictators comes Africa's third liberation



39 While Western eyes view Robert Mugabe as a vote-rigging dictator, to many in Africa he is a liberation hero. A 'third liberation' through economic development must allow Africans to set their own agendas.

Asia: How serious is Asia about competition law?



58 Most countries across Asia have substantive competition legislation, but serious gaps remain. Lack of pan-Asian harmony is forcing companies to adopt a country-by-country approach.

The content of IBA Global Insight magazine is written by independent journalists and does not represent the views of the International Bar Association.

International Bar Association

4th floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org
editor@int-bar.org
advertising@int-bar.org

© International Bar Association 2013

All rights reserved. No part of this publication may be reproduced or transmitted in any form or any means, or stored in any retrieval system of any nature without the prior written permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

IBA LEADERSHIP

President Michael Reynolds
Vice President David W Rivkin
Secretary-General Martin Šolc
Executive Director Mark Ellis

SUBSCRIPTIONS

Free to members of the International Bar Association

Subscriptions 2014
£36/\$58 (full year)
£7.50/\$12 (single issue)

Please order from the International Bar Association at subscriptions@int-bar.org

EDITORIAL AND DESIGN

Director of Content James Lewis
editor@int-bar.org
Creative Director Tim Licence
Senior Content Editor Ed Green
Senior Reporter Rebecca Lowe
Senior Artworker Penny Newton
Creative Artworker Leonie Girard
Content Editor Emily Silvester
Junior Content Editor Hannah Caddick

Postmaster – send corrections to:
member@int-bar.org

ADVERTISING

Head of Advertising and Sponsorship
Andrew Webster-Dunn
advertising@int-bar.org

Printed by Cambrian Printers, Wales.

© International Bar Association 2013



From the Editor

In October, former US Secretary of State Madeleine Albright gave the keynote address (see **Madeleine Albright**, page 16) to a packed audience at the opening ceremony of the IBA's Annual Conference, which hosted a record attendance of nearly 7,000 people (see **IBA Annual Conference**, page 5). Asked what keeps her awake at night, she spoke of the themes in her book *Memo to the President Elect*, which she presented to Barack Obama, inscribed with the words 'With the audacity to hope that this book might be useful'.

Of course, she spoke of nuclear weapons and terrorism (a theme covered in this edition, see articles on **Guantánamo** and the **UN drone inquiry**, page 9 and 10), but also the gap between rich and poor (see **Poverty post-financial crisis**, page 51), the issue of energy, environment, and pandemic disease (see **Bianca Jagger: accountability key to cutting human cost**, page 13) and the need to restore the good name of democracy (see **US government shutdown**, page 29). But, she said, her main concern is that the system isn't working in order to deal with these issues. Albright highlights the fact that 'there is something new in the world today, which is non-state actors. And non-state actors are not just the terrorists. Non-state actors are also businesses and non-governmental organisations [...] And the non-state actors are never at the table [...] we haven't quite figured out how to adjust the institutional structure [...] to make it work for the 21st century'.

This is also the 150th year since US President Abraham Lincoln gave the Gettysburg Address, in which he proclaimed the end of the Civil War as 'a new birth of freedom' that would bring true equality, through 'government of the people, by the people, for the people'. As the first woman to hold the position of US Secretary of State, one of the most powerful in the world, Albright could be viewed as testament to the strides made towards equality of opportunity. Nevertheless, the themes she emphasises highlight the work that remains to be done to deliver on Lincoln's simple vision. These themes are reflected in this edition of *Global Insight*, suggesting roles that the IBA – an organisation that, as former Federal Reserve Chairman Paul Volcker puts it, 'carries the full weight of a long respected and honoured tradition' – can play in re-shaping the world in the 21st century.

James Lewis

Selecting the Right Local Counsel Can Make A World of Difference

The vibrancy of the Turkish economy has drawn many global law firms to enter the Turkish legal scene in recent years. Most entrants have chosen to establish exclusive partnerships with existing local firms as the quickest way to market. Investors tend to choose local counsel based on either their global counsel's local affiliation or on the basis of existing familiarity with local firms. For local firms, success in the Turkish commercial law market has therefore depended on either forming the right strategic alliances with global firms, or having a strong enough "brand" to attract clients on its own.

Perhaps the most recognizable firm belonging in the latter category is Hergüner Bilgen Özeke. Established in 1989, Hergüner currently employs nearly 100 fee earners under 12 partners. Hergüner offers a full range of services, and is counted among the top tier of firms in virtually every category of legal services. Hergüner is known as the firm which brought the full-service law firm concept into Turkey and sustained it at the highest level since its inception; this reputation has enabled it to sign clients pursuing some of the most significant transactions in the market, even without the added cachet or the connections that come with exclusive affiliation with a global partner.

Selecting the right local counsel has been especially critical in light of the momentous changes in Turkish commercial laws in recent years. Hergüner has already accumulated significant operational experience structuring deals under these major revamped laws, most notably in establishing a venture capital investment company and structuring it to comply with the restrictions



put in place by the new Capital Markets Law. Hergüner has also been active on the M&A scene, advising in a major cross-border asset swap of power generation portfolios which made international headlines and tested some new provisions of the Turkish Commercial Code.

With the Turkish market gaining fluency with a spate of new entries, some firms like Hergüner have relished the competition and made themselves stand out in how easily they can transition between the local and international aspects of cross-border transactions and integrate local knowledge into transaction structures. Global firms working with the Turkish market on a per-transaction basis, rather than entering the market through a more permanent alliance, will surely appreciate the option of working with such a high-caliber partner when shopping for local counsel.

For further information please contact:
info@herguner.av.tr

US and world's legal profession must address serious governance failings, says Paul Volcker

REBECCA LOWE AND JAMES LEWIS

While viewing itself as an exemplar of the rule of law, America is in reality suffering from widespread and growing corruption, failures of governance and a 'distorted political process' overly dependent on wealthy funders, says Paul Volcker, former Chairman of the Federal Reserve.

'The successful attack on corruption depends upon a strong sense of rule of law, but it's equally true that widespread corruption makes a strong rule of law an impossible dream,' Volcker told a packed audience of lawyers at the IBA's Annual Conference in Boston. 'You carry the full weight of a long respected and honoured tradition. If we fail to maintain an effective rule of law and a strong defence against corruption, two sides of the same coin, then you can hardly escape complicity.'

The former Fed Chairman launched the Volcker Alliance in New York City earlier this year to help improve the implementation of public policies. 'There's plenty of debate about what governments ought to do on grand policy,' he said, and quoting from Thomas Edison, emphasised that 'vision without execution is hallucination'. He added: 'Too often it shows up in poor performance. It all feeds the sense that government can't be trusted.'

According to the most recent Gallup poll, only a quarter of Americans now believe corruption is 'not widespread' in their country. Volcker blamed the collapse in confidence on 'heavy campaign spending' and urged the audience to help mend the broken system: 'Should we be satisfied that we live with a really effective rule of law, when the perceived need for heavy campaign spending has come to dominate our political process? We let those financing practices infringe in a very basic way upon the rule of law, with its sense of even-handedness and openness. Does it not breed behaviour that is accomplished by any reasonable definition of corruption?'

Elizabeth Rindskopf Parker, former General Counsel of the CIA and NSA, echoed Volcker's remarks in an interview with *Global Insight*. Voicing concerns about the lack of congressional checks on the executive,



particularly concerning security and law enforcement, Parker was forthright with her criticism. 'I do not think our congressional mechanisms work well,' she said. 'Why don't they work well? One answer – maybe the main answer – is that the representatives don't have enough time to focus on this. They are too busy raising money for their next election.'

According to Stephen Zimmermann, Director of Operations for the World Bank's Integrity Vice Presidency, lack of trust in public institutions makes anti-corruption policies particularly challenging to enforce. 'If the public does not have confidence in their courts and their prosecutors and their investigators, it is very difficult to get over that hump and begin effective efforts to combat corruption,' he said, speaking alongside Volcker.

With a mandate to investigate fraud and corruption in Bank-financed activities, Zimmerman was well placed to judge corporate conduct across the world – and businesses in the US and other developed nations were far from blameless, he stressed. 'In my experience, while many of the western companies are able to say "we rank high on the Transparency International Index, we have no or very minimal corruption in our countries", we often don't see the same behaviour in the developing world,' he told the

assembled lawyers. 'The companies that may behave with greater integrity in their own countries sometimes feel a little more free to engage in corrupt activities in the developing world.'

Others had more faith in corporate and state governance, however. Robert Khuzami, former Director of the US Securities and Exchange Commission (SEC) Division of Enforcement and former General Counsel of Deutsche Bank, maintained that US regulators and prosecutors were doing an effective job in holding the corporate world to account. While he conceded fraudulent activity was widespread during the financial crisis, he believed the SEC and law enforcement authorities now had it under control.

When asked about the potential pitfalls of regulatory capture – when regulatory agencies come to be dominated by the industries they are charged with regulating – Khuzami gave a passionate defence. Despite having come from Deutsche Bank, at the SEC he brought a record number of cases against high ranking officials, he said. Regulators also face 'very strict ethical and recusal restrictions' on them when they leave, under threat of criminal sanction – and, more importantly, they are viewed by companies as 'ambassadors for compliance and lawfulness'.

'These people can walk into the CEO's office and say, I used to work at the SEC, I'm telling you that if we do this, this is what may well happen. And that person has credibility and stature in a way that others may not,' he said. 'It's not that I don't understand the criticism [...], but the benefits to having people come in and out of government are so significant, with the right ethical restrictions on the way out, that I think on balance the system works extremely well.'

Press here to Read the full article at tinyurl.com/IBANews-Volcker.
Press here to Watch the Paul Volcker's speech at the opening ceremony of the IBA Annual Conference at tinyurl.com/IBA-Volcker-speech.
Turn to page 23 for full coverage of Paul Volcker's address at the IBA Annual Conference Rule of Law Day.

IBA Annual Conference

Boston, 6–11 October 2013



Boston 2013 was the most successful Annual Conference staged by the IBA to date (**see box**). The IBA's coverage features films of the opening ceremony and interviews with delegates and speakers. Highlights include:

- former US Secretary of State Madeleine Albright on terrorism, al-Qaeda and security;
- the IBA Presidential Task Force report on the Global Financial Crisis, *Poverty, Justice and the Rule of Law*;
- 'Conversations with...' leading international figures, including Cherif Bassiouni on the Middle East, post-Arab Spring;
- Rule of Law Day, including former Federal Reserve Chairman Paul Volcker on corruption; and
- sessions including, 'What happens in Vegas, stays on the internet'.



Press here to find various sessions, addresses, photographs and the *IBA Daily News* conference newspaper on the IBA website at tinyurl.com/BostonCoverage.



Record breaking Boston 2013 in numbers

6,724

Total attendance
(6,154 delegates, speakers, press and exhibitors, 570 guests/ accompanying persons)

134

Jurisdictions represented

3,272

Law firms, bar associations, businesses and other organisations represented

91%

Proportion of attendees rating the conference as Excellent or Good*

* Based on the Attendees' Satisfaction Survey

Susan Finegan wins IBA Pro Bono Award



The Pro Bono and Access to Justice Committee award recognises lawyers who are leading the legal profession in building a pro bono culture. This year's winner is Boston-based Susan Finegan, a Partner at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, who received the reward for providing access to pro bono assistance for the many non-profit organisations giving support to victims of abuse. Six other nominees were also selected for particular recognition.

Finegan said, 'It has been so gratifying to have worked with clients throughout the years who are survivors of domestic violence, sexual assault, and human

rights abuses. I continue to do this work because of these incredible clients who continue on, in such a courageous way, despite the many challenges they have faced in their lives.' She added, 'I am humbled to accept this award on their behalf. I am also grateful to have worked at a law firm that allowed and encouraged me to do pro bono work from my first week on the job, almost 20 years ago. Growing up in this professional culture for the past two decades, I have observed what an impact a law firm can have, tipping the balance in favour of those clients who previously have had no voice, and have no power.'

Former NSA legal chief: US surveillance requires greater transparency

REBECCA LOWE AND JAMES LEWIS

Controversial electronic surveillance programmes operated by the US National Security Agency (NSA), exposed in June by whistleblower Edward Snowden, require far greater transparency and accountability, according to a former NSA legal chief.

Rulings by the Foreign Intelligence Surveillance Court (FISA court), established in 1978 to review requests for surveillance warrants from law enforcement agencies, should be subject to more rigorous public scrutiny and oversight, according to Elizabeth Rindskopf Parker, former General Counsel of the NSA and CIA.

'I am for much more transparency, because I think one of the lessons learnt historically is that what our courts do is really educate, and educate through the opinions that they write,' Parker tells *Global Insight* in an exclusive interview. 'So we have to figure out a way to let this court be more transparent, so it can take more of a role in educating, thoughtfully reviewing and, [...] when it's appropriate to do so, bringing the government up short.'

Each application to the FISA court must contain a certification by the US Attorney General that the target of the proposed surveillance is either a 'foreign power' or 'the agent of a foreign power' and, in the case of a US citizen or resident alien, that the target may be involved in the commission of a crime. However, the court has been criticised for signing off on broad orders that allow the mass surveillance and storage of US citizens' data.

Many critics believe the court acts as little more than a rubber stamp for the NSA, having approved nearly 100 per cent of requests. In 2012, 1,856 applications were made and none were rejected, according to the Electronic Privacy Information Center.

Without more effective oversight mechanisms, the US risks repeating the mistakes made in the pre-Watergate era, Parker says. In the 1950s-70s, a US Senate select committee – the Church Committee – severely criticised intelligence gathering techniques by the CIA, NSA and FBI, which included opening mail without a warrant.

'I have long thought that part of what happened [during the Church era] was because decisions being made within the



CIA about covert action were not subject to transparent review, she says. 'What happened was that the CIA, let alone the public at large, was denied that period of re-evaluation that what it was doing was consistent with evolving norms of conduct and public expectation.'

The George W Bush administration made a 'serious mistake' in not being more transparent when setting up data collection programmes such as Prism after 9/11, Parker adds. She believes that the extent of NSA surveillance was kept secret in order to 'pull back more authority to the president' as commander-in-chief over national security. 'This was almost a policy, political rationale, and I think that was a mistake,' she says.

Despite her misgivings, Parker believes the mass public outrage that greeted Snowden's revelations – which, she stresses, will prove 'hugely damaging' to the US – was 'overdone'. Such a reaction was perhaps due in part to a general mistrust among citizens towards government activities, she says, and in part to confusion over the true nature of the intrusion.

According to the NSA, it is only the metadata of phone and internet traffic that is intercepted and analysed. The content of messages is also collected, but not accessed unless there is 'a nexus to al-Qaeda or other terrorist groups', according to outgoing NSA Director Keith Alexander. Senior NSA officials have differed in their testimonies over how instrumental the intercepts have been in preventing terrorist attacks.

On 11 October, the FISA court renewed the NSA's telephone metadata collection programme, which operates under section 215 of the USA Patriot Act. The data includes the time and duration of calls, along with the number dialled.

For Bill Keller, former Executive Editor of The New York Times, the NSA urgently needs to provide evidence of whether the surveillance has made citizens safer, as well as address concerns that the system may have been abused. The paper first reported NSA intrusion in 2005, having held off publishing the story for a year, during which Keller came under intense pressure from the Bush administration, which stressed the impact it could have on national security.

'The government asserts that [the surveillance] has been helpful in some number of cases in warding off potential terrorist attacks, but I don't have evidence of that,' Keller tells *Global Insight*. 'Because there is no really independent accountable body overseeing this programme – and I don't count Congress in this case – I can't answer the question as to how much this is actually serving the purpose of national security, so I would like more transparency.'

Press here for the full article at tinyurl.com/USsurveillance.

View film of former NSA and CIA legal chief and Bill Keller, former Executive Editor, New York Times.

Calls for Turkish arbitration centre as region's influence grows

REBECCA LOWE

Turkey is swiftly becoming a country of unrivalled strategic importance following a decade of booming economic growth, prompting renewed calls for an Istanbul-based international arbitration centre to resolve complex disputes.

The country's location, straddling Europe and the Middle East, has long made it an influential regional player. But a new surge of inward and outward investment, alongside shifting relations with neighbouring states, has considerably boosted its commercial and trade significance.

'People unfamiliar with the region forget that Turkey is a thousand miles from one side to the other, and 80m people live there,' says Dentons partner and energy specialist Karl Hopkins, who heads a team of practitioners providing strategic and legal advice to national oil companies.

Turkey has attempted to establish an arbitration centre in the past to deal with its growing number of international disputes, but has lacked the necessary support. Now, however, a draft law to set up the Istanbul Arbitration Center has been submitted to parliament and, if passed, is due to come into force in April 2014.

If approved, the centre would have one court for domestic disputes and one for international disputes. The draft law states it must determine its rules of arbitration, as well as other alternative dispute resolution mechanisms, within six months of the law's enactment.

While the law has been celebrated by some, others have voiced concerns that intervention by the Turkish Ministry of Justice may undermine the centre's independence. According to the law, the centre's general assembly would comprise 20 members from a handful of financial institutions, which some fear may have undue influence over proceedings.

'There is definitely room for a regional arbitration centre in Istanbul to be successful, but it will not happen overnight,' says Covington & Burling energy partner Gaëtan Verhoosel, Co-Chair of the firm's International Arbitration Practice. 'It will be important for the new centre to be fully independent of the government



in terms of funding and otherwise, and to build up its credentials in terms of international capability and independence.'

The backlog in the Turkish court system has added to arbitration's growing popularity. Over a million civil cases were pending at the start of 2011, alongside 1.4 million criminal and 200,000 administrative cases.

With investment pouring in from Europe and Asia, and outward investment extending from the Balkans to Bhutan, the country is desperately in need of a reliable and efficient means to resolve disputes. In 2012, Turkey ranked as the world's 13th most attractive destination for Foreign Direct Investment (FDI), according to the A T Kearney Foreign Direct Investment Confidence Index.

Yet further reservations remain. Many believe the Turkish judiciary needs more experience and training in arbitration and international commercial law before an arbitration centre would be viable. Judges have been criticised for being overzealous in setting aside arbitral awards due to 'public order' considerations, while the arbitration system as a whole is seen by some as too complex and reminiscent of civil litigation proceedings.

'The biggest problem is bandwidth,' says Hopkins. 'The number of lawyers who are up to the task is relatively small. There are now some really good Turkish firms, but when you get outside the international arenas of Istanbul and Ankara, you'll have a hard time finding someone who has the requisite skills.'

Turkey began accession talks to join the EU in 2005, but talks have

repeatedly stalled due to concerns about democracy and human rights. In June, EU foreign ministers backed a proposal to postpone further talks for about four months, following the government's violent crackdown on protesters critical of the regime.

However, insiders claim that behind the scenes the relationship between Turkey and its EU and US allies remains strong. Indeed, Turkey has never been more powerful in terms of commerce, trade and security. While its energy reliance on Iran weakens, its relations with neighbouring Kurdistan – once its sworn enemy – are blossoming. An oil pipeline from Kurdistan is due to be built through the country next year, allowing the Kurds to bypass Baghdad and reap the spoils. Turkish companies are now flocking to the oil-rich region, alongside energy giants such as ExxonMobil, Chevron and Total.

'One of the most significant developments has been Turkey's investment in Kurdistan,' says Jeremy Wilson, a partner and energy specialist in the International Arbitration Practice at Covington & Burling. 'Until recently the use of the word Kurdistan was taboo in Turkey and there was little cross-border trade, but now Turkey sees huge opportunities to import oil and gas from the Kurdistan region.'

The deal was classic *realpolitik*, stresses Hopkins. 'Economics always trumps ideology. It became too expensive for them to hate each other anymore.'

For the latest online *Global Insight* stories, see tinyurl.com/IBANews-TurkishArbitration.

THE GLOBAL LEGAL POST

The Very Best Coverage of the Legal Market

Events

The Luxury Law Summit

In association with the International New York Times - London May 2014

The *Luxury Law Summit* is the new event for the international luxury and legal calendars looking at the developing challenges which will impact the business of luxury brand development and retail, providing clear analysis and positive solutions for business leaders and their legal teams. The *Luxury Law Summit* brings together luxury business leaders, luxury legal experts and regulators for high level networking, debate and informative roundtable sessions.



The Energy Law Summit

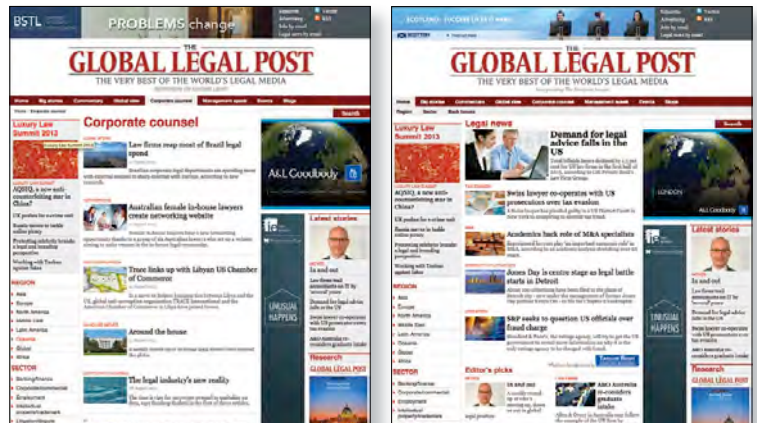
In association with the International New York Times - London March 2014

This new event for the energy sector will look at the impact on companies operating in this highly visible market, examining risk and regulation, climate change, the changing political landscape and the implications of the developments in shale oil and gas. The *Energy Law Summit* will bring together energy business leaders, general counsel in energy companies and regulators.

News

The Global Legal Post

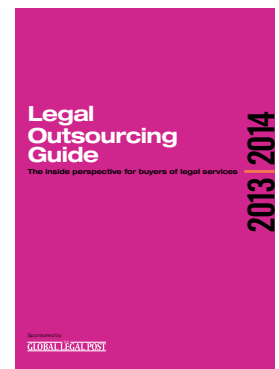
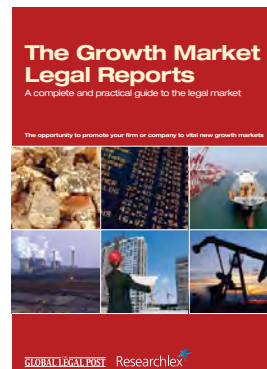
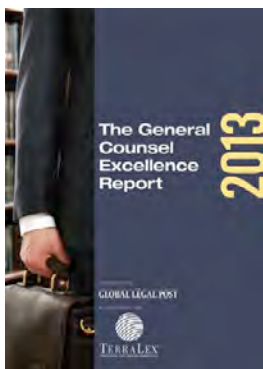
The *Global Legal Post* is the world's fastest growing legal news and views digest. Bringing the very best of the world's legal media to 100,000 lawyers globally on a daily basis, it provides a commentary on the world's legal press, blogs, tweets, LinkedIn, web and global media. It is essential reading for business lawyers globally. Published by the most experienced team in legal media, it also publishes the Corporate Counsel Weekly news briefing and the monthly Telecoms Legal Post.



Research and Publishing

ResearchLex, The research division of *The Global Legal Post* conduct and publish wide-ranging reports and surveys across the international legal sector. Latest research and publications include:

- The General Counsel Excellence Report 2013
- The Wealth Report 2013
- The Selection and Retention of Law Firms in Western Europe (in association with Lexis Nexis)
- The Growth Market Legal Reports (publishing 2014)
- Legal Advisors to Wealthy Individuals – China Edition (publishing 2014)
- The Legal Outsourcing Guide 2013/2014



www.globallegalpost.com

For further information on the above products please contact Maria Sunderland.
+44 (0) 20 7332 2576 mariasunderland@globallegalpost.com
23-24 Smithfield Street, London EC1A 9LF, UK

Guantánamo: US government advisers on future of the controversial detention camp

REBECCA LOWE

Guantánamo Bay is a serious mistake that mustn't be repeated, according to top legal advisers to the US government, military and CIA – including those closely involved with the controversial Cuban base. However, an alternative detention facility for terrorist suspects is still a possibility under international law, they say.

Global condemnation of Guantánamo continues, with 164 detainees still imprisoned at the site despite President Obama vowing in 2009 to close it within a year. But experts with detailed inside knowledge stress that the creation of the centre must not be confused with the subsequent poor treatment of detainees, and a replacement facility may be established in future.

Speaking at the IBA's 2013 Annual Conference in Boston, Alberto Mora, former General Counsel of the US Navy; John B Bellinger III, Legal Adviser to the US Department of State and the National Security Council under George W Bush; and Elizabeth Rindskopf Parker, former CIA and NSA General Counsel, all voiced their views on the future of the controversial prison and its status under domestic and international law.

Mora, who spearheaded efforts to end coercive interrogation tactics at Guantánamo, told the audience he believed there was 'no reason why Guantánamo as a place could not have worked'.

'The problem was that the laws and the rules we applied to Guantánamo didn't work,' he said. 'They were not seen as rendering justice consistent with our international standards at the time, and that is what has caused the controversy.'

He added: 'Maintaining detainees closer to the battlefield and adjudicating their status and future much more rapidly are certainly some of the lessons we've learnt.'

Stephen Vladeck, American University Washington College of Law professor, pointed out that the President 'had never said a word about ending military detention without trial'.

'I think that was very deliberate,' he said. 'So I think the question is not just, "do we close Guantánamo", but is it going to be the forward-looking policy of the US that at least some terrorist suspects can be detained militarily without trial



anywhere, whether it's on a Navy ship or in New York?'

The US Congress has repeatedly stymied Obama's efforts to close Guantánamo by blocking funds needed for the transfer or release of prisoners. However, the task has also been complicated by other hurdles: 44 of the prisoners are considered too dangerous to release but too difficult to prosecute, while the 85 Yemeni inmates cannot currently be deported due to the unstable security situation at home.

The US has long been criticised for not trying inmates under domestic criminal laws. However, Bellinger explained that for most prisoners this wasn't possible because US laws did not apply to Afghan nationals who had not committed a terrorist act against the US.

'They may have trained in Al-Qaeda training camps, but unless they had actually committed an act of terrorism or conspired to do so, they hadn't violated US laws,' he said.

Bellinger has pointed out repeatedly that, as a lawyer advising the US government, he had to explain its procedures on Guantánamo in public, but that he had at the same time been privately arguing for its closure and for changes to the military commissions.

A key problem, Parker said, was that international law was simply not equipped to deal with a global battle against terrorism.

'Here we are in a hot battlefield and we are apprehending alleged participants, and something has to be done with those people,' she said in an exclusive interview with *Global Insight*.

'So historically, what would we have done? Well we would have had the normal kinds of POW camps that

international law contemplates – but these combatants were unusual and fell between the definitional constructs of our international law.'

But Parker says mistakes were made in addressing this problem: 'We had some choices to make, and here I'm not sure we made the right choices.'

Guantánamo was established in 2002 to hold, interrogate and prosecute terror suspects, subsequent to a military order issued by President Bush on 13 November 2001. The order authorised the Pentagon to hold 'extraordinarily dangerous' terrorist suspects in indefinite custody without charge, as part of America's global 'war on terror' following 9/11. Prisoners were held as enemy combatants under the laws of war and initially blocked from exercising their rights under the Geneva Conventions. However, a series of Supreme Court decisions gradually struck down executive powers, ruling that the war crimes commissions used to try suspects were illegal and prisoners were entitled to challenge their detention in civilian courts.

In 2009, dozens of detainees took advantage of their newly acquired rights to launch habeas corpus petitions in US courts. Thirty-eight of 61 cases have so far been won by the detainee. The legal power of the military commissions to try prisoners is also currently being challenged at the US Court of Appeals in a parallel case.



Read the full article online at tinyurl.com/IBANews-Guantanamo.

View film of top US Government advisers on Guantánamo here.

Investigator condemns 'insurmountable obstacles' in UN drone inquiry

CHRIS HARMER

The On Friday 25 October, the findings of an inquiry into drone warfare will be reported to the United Nations General Assembly by UN Special Rapporteur Ben Emmerson QC.

The report marks the culmination of an inquiry which began in January 2013 into the use of unmanned armed vehicles in lethal counter-terrorism operations.

One of the inquiry's central objectives was to investigate allegations that missiles released by drones have caused a disproportionate number of civilian casualties.

However, the report lays bare one of the principal obstacles to the investigators - namely an absence of transparency on the part of states into the conduct and consequences of drone missile attacks.

Emmerson cites the involvement of the CIA as 'an almost insurmountable obstacle to transparency' along with the failure on the part of the US administration to release data on the level of civilian casualties inflicted through the use of remotely piloted aircraft in Pakistan and elsewhere.

Israel did not respond to the investigation's inquiries about the use of drone missiles in Gaza where it is acknowledged that they have caused many civilian deaths and injuries. This follows Tel Aviv's decision to suspend its relationship with the UN's Human Rights Council - the body which gives Emmerson his mandate on the promotion and protection of human rights while countering terrorism.

The inquiry sought to investigate 33 drone strikes reported to have resulted in civilian casualties in Afghanistan, Pakistan, Yemen, Libya, Iraq, Somalia and Gaza - but the inquiry has not yet been able to access evidence that will provide clarity on the circumstances of the strikes.

In addition to the withholding of evidence to the inquiry other efforts to achieve greater accuracy on the numbers of civilians killed and injured by drone missiles have also been thwarted by security threats - especially in the Federally Administered Tribal Areas of North West Pakistan - which have borne the brunt of drone missile attacks.

The investigation reports estimates from the Pakistan government that



dvande / Shutterstock.com

330 drone strikes have caused 2,200 deaths and 600 serious injuries and the deaths of at least 400 civilians. But given the obstacles to investigating civilian casualties it is acknowledged that these are likely to be underestimates.

One of Emmerson's principal recommendations is that states must fulfil their obligations to investigate and report any cases where there are grounds to believe that civilians may have been killed. He cites the legal requirements of states to be fully accountable for civilian casualties under international humanitarian law and international human rights law and rejects the explanation that national security justifies the withholding of data on civilian casualties.

Emmerson also reports the continued use of remotely piloted aircraft in the Federally Administered Tribal Areas as a violation of international law on the grounds that it is in breach of Pakistan's sovereignty and contrary to Islamabad's position that 'drone strikes on its territory are counterproductive, contrary to international law and...should cease immediately.'

Emmerson's other recommendations arise from the identification of a number of legal questions on which there is currently clearly no international consensus. These concern the applicability of existing law to the conduct of drone warfare - in other words, the body of international law constructed in the aftermath of two world wars in efforts to balance conflicting principles of humanity and military necessity and place limits on the taking of life.

The report addresses the conflicting and diverse legal opinion that has

emerged since the attacks on the US by al-Qaeda. At one end of the spectrum is the view that international humanitarian law applies to the use of any weapon in armed conflict and that international human rights law should govern their use outside theatres of armed conflict. At the other is legal opinion that western democracies are in an era of global warfare against non-state enemies such as al-Qaeda, the Taliban and 'associate forces' and does not recognise any boundaries to the theatre of war.

This latter interpretation has been rejected by the International Committee of the Red Cross on the grounds that this 'would mean that the whole world is potentially a battlefield and that people moving around could be legitimate targets... wherever they might be.'

Acknowledging these conflicting interpretations of the relevant laws, Emmerson stresses the 'imperative need to seek agreement between states on these issues' and the necessity for states to respond to his requests for clarification and agreement as a matter of urgency.

The report was presented by Emmerson to the General Assembly in October. He intends to submit a final report on the use of remotely piloted aircraft in counter-terrorism operations to the Human Rights Council in 2014.



For a related story, see [Drone strikes: US must explain legal interpretations and respond to allegations of civilian harm, says UN Inquiry advisor by Chris Harmer, at tinyurl.com/IBANews-USdrones](http://tinyurl.com/IBANews-USdrones).

IBAHRI discusses Commonwealth values in Thailand following revocation of Sri Lanka visas



The day before the start of the Commonwealth Heads of Government Meeting (CHOGM) in Colombo Sri Lanka, the IBAHRI – having been barred by Sri Lankan authorities from entering the country (see **p 15**) – held a press conference in Bangkok, Thailand, to discuss ‘Making Commonwealth Values a Reality’.

The event was held in collaboration with the International Commission of Jurists (ICJ) at the Foreign Correspondents’ Club on 14 November 2013 and was streamed live to an international audience. United Nations Special Rapporteur Gabriela Knaut, a member of the barred IBAHRI delegation, recorded a message for the press conference. Also barred from entering Sri Lanka and present in Bangkok was the first UN Special Rapporteur on the Independence of Judges and Lawyers, barrister Dato’ Param Cumaraswamy, IBAHRI Senior Programme Lawyer Alex Wilks, and UK barrister and IBAHRI mission rapporteur Sadakat Kadri.

At the Conference, the IBAHRI and the ICJ urged Commonwealth Heads of State meeting in Colombo to make Sri Lanka accountable to Commonwealth values. Recalling the Commonwealth Charter (2012) and its 16 core values, including safeguarding the independence of the judiciary, protecting the rule of law, respecting the separation of powers and promoting democratic rule, the two organisations pointed out numerous examples where these values have not been respected by the Government of Sri Lanka.



A short film of the event is available to watch at tinyurl.com/IBAHRI-Bangkok-pressconf.

Women’s rights in Darfur: ‘Training of trainers’ workshop in Arusha



The IBAHRI has partnered with the Human Rights and Social Justice Research Centre at the London Metropolitan University (HRSJ) to build the capacity of Sudanese lawyers to address human rights violations of women and girls living in Darfur, and particularly those living in internally displaced persons (IDP) camps. The joint project aims to train lawyers to become trainers in their own communities on issues relating to sexual and gender-based violence. The IBAHRI and HRSJ are working closely with the Darfur Bar Association (DBA).

In June 2013, the IBAHRI and HRSJ completed phase one of the project, with a week-long training in Arusha, Tanzania. The first component provided training on the international and domestic mechanisms protecting women’s rights and expert input on effective project design. Participants conducted needs assessments, in order to identify the issues that are most relevant to their communities and most beneficial to women.

In November, 20 lawyers and paralegals from Darfur reconvened in Arusha, for the second of three modules of the innovative ‘Training of trainers’ programme. Module two workshops guided participants on the design and implementation of targeted community-action projects that raise awareness of the human rights of women and girls. The third module will take place in 2014.

Abdelrahman Gasim, Protection and External Relations Secretary of the DBA: ‘The IBA and the HRSJ have significant experience in building the capacity of human rights defenders. By developing the skills of DBA members on international human rights and project design, this programme not only builds our capacity to promote and protect women’s rights, but also the capacity of communities in Darfur. We are particularly pleased that so many female lawyers can participate in the programme.’

The IBAHRI in Boston

The IBAHRI enjoyed a successful week at the 2013 IBA Annual Conference, 6–11 October 2013. Marking the 65th anniversary of the Universal Declaration of Human Rights, the IBAHRI showcase session ‘Human rights at 65: Hale and hearty or in need of resuscitation?’ discussed whether human rights are being observed or undermined. The IBAHRI held joint sessions with the LGBT Sub-Committee on the repeal of sodomy laws and the Environment, Health and Safety Law Committee on climate change and human rights, and a session the use of drones. Boston also marked the launch of the IBAHRI report *Tax Abuses, Poverty and Human Rights*, with a working session at the conference and a side event in the Harvard Kennedy Law School.

Read more online at tinyurl.com/IBAHRIBoston.

Delivering expert knowledge to global counsel



InternationalLawOffice.com

For more information please contact:
info@internationallawoffice.com

Online Media Partners



Bianca Jagger: accountability key to cutting human cost of climate change

REBECCA LOWE

New mechanisms are urgently needed to hold corporations and states legally accountable for harm to the environment, according to leading environmental experts speaking at the IBA Annual Conference in Boston.

Unchecked climate change is predicted to cause severe increases in sea level, floods and droughts, triggering mass displacement, food shortages and disease. Yet, while states have a legal duty to protect the human rights of citizens, there is currently no global treaty that recognises people's right to a healthy environment.

Addressing a packed auditorium of 250 lawyers, Sir Crispin Tickell, former President of the Royal Geographical Society and former UK Permanent Representative to the United Nations, voiced frustration at the lack of global cooperation to address climate justice. The absence of both an international court to deal with environmental violations and a world environmental organisation to bring together the 'many limited agreements' addressing climate change 'has led to a widespread failure to recognise the relevance of human rights in dealing with environmental issues', he said.

Speaking alongside Tickell, John Knox, the first UN independent expert on human rights and the environment, appointed in 2012, voiced support for an international environmental court, but said historically such an idea had received scant support from the global community. However, now that more states were starting to bring environmental claims to the International Court of Justice – the principal judicial organ of the UN, without criminal jurisdiction – Knox conceded that the political climate may be changing.

'Despite the lack of success in the past, maybe this is an opportune time to push for an international court for the environment again,' he said. 'But history does not inspire one with much confidence that states will rush to adopt it.'

Leading environmentalist Bianca Jagger, Chair of the Bianca Jagger Human

Rights Foundation, believes a better idea may be to incorporate environmental abuses – or 'crimes against present and future generations' – under the mandate of the International Criminal Court (ICC). Currently, the Court's docket includes only the most serious human rights violations: genocide, war crimes, crimes against humanity and crimes of aggression.

Jagger's main aim, she told *Global Insight* in an exclusive interview in Boston, was to hold multinational corporations to account. 'When they were setting up the ICC, they talked about ecocide and it was defined in a very similar way to what I'm working on now,' she said. 'In the end they left it behind, but that doesn't mean they couldn't take it on again. What we need [...] is to realise that we need to have

Despite the warnings, there has been very little discussion on where displaced people will go. Speaking at the conference, environmental lawyer Michael Gerrard, Andrew Sabin Professor of Professional Practice at Colombia Law School, said it was imperative for the 'major emitting nations' to take responsibility. Australia, Canada, Russia, the US and others should accept a share of the displaced people in proportion to their contribution to the greenhouse gas in the atmosphere, he argued – with the exception of China, the worst polluter, which would have its own internal devastation to deal with.

Creating such an agreement would be extremely difficult, he conceded, because 'there is not a country in the world that has expressed any interest whatsoever in taking in climate displaced people'.

However, he added: 'The decade will come when the world will have to be confronted with the issue of who will have to take these people, or else we will see reports every day of ships floundering and people dying.'

Jagger, who attended the 2011 UN Framework Convention on Climate Change in Durban, South Africa said: 'It was such a low point; it was

shocking. To think that was the best we can offer to present and future generations.' The IBA Task Force on Climate Change Justice and Human Rights, established last year following a call to arms from former President of Ireland and United Nations High Commissioner on Human Rights, Mary Robinson, must bring about accountability, Jagger said. 'Durban was an abdication of world leaders' responsibility, the fact they were incapable of coming together and signing onto a treaty that will be enforceable. We continue to use these volunteer measures [...]. This needs to stop.'



accountability, that we need to put an end to the culture of impunity among corporations [...]. The mechanisms we have are non-enforceable and most of them are volunteer. They can shame a corporation but not make them accountable before a court of law.'

The most recent Intergovernmental Panel on Climate Change report, published in September, states that global warming is likely to exceed 2°C by the end of the century – even if greenhouse gas emissions are significantly reduced. This would wreak devastation on the planet and potentially lead to the displacement of hundreds of millions of people across the world, according to scientists in the field. Island nations such as the Maldives and the Bahamas are likely to be devastated due to rising sea levels.

 View Bianca Jagger's interview and more coverage from Boston at tinyurl.com/IBAfirms.

IBAHRI report: prosecution of Venezuelan lawyer José Amalio Graterol arbitrary

The IBAHRI has published a report on the criminal trial of Venezuelan lawyer José Amalio Graterol, defence lawyer to one of Venezuela's most high profile political prisoners: Judge María Lourdes Afiuni. Graterol was arrested on 4 June 2012, a day after he had made public criticisms of the Venezuelan authorities' handling of the Afiuni case. He was charged with 'obstruction of justice' because he refused to continue a trial in a separate case where his client had not appeared, in accordance with Venezuelan law that at the time prohibited trials in absentia. A few days later, the Venezuelan Criminal Procedure Code was amended by presidential decree to allow for trials *in absentia*, effectively basing Graterol's charge on a retroactive use of the amended provision.

The IBAHRI is the only international organisation to have maintained an observation at hearings in the Graterol trial, conducted between July and December 2012. The report is based on the findings of the observation. It concludes that his prosecution was arbitrary and lacking basic due process safeguards. The report notes multiple due process violations of national and international law. In particular, concern is expressed that the retroactive criminal penalty imposed is contrary to international human rights standards, specifically, Article 15 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the Inter-American Convention on Human Rights



Caracas, 14 June 2013: Judge María Lourdes Afiuni (L) leaves her house with her lawyer José Amalio Graterol

(IACHR); the lack of a judicial order for Graterol's arrest; the contradictions between the prosecutor's allegations and the lack of witness testimony; and significant procedural delays.

Given the circumstances surrounding the conviction, the report highlights that it is difficult to escape the conclusion that the prosecution has been brought against Graterol in order to frustrate the defence of Judge Afiuni and/or in retribution for his defence of Afiuni and related public criticisms. Therefore, the report considers that as well as violating basic due process standard, the prosecution and conviction of Graterol contravenes

several guarantees for the functioning of lawyers contained in the UN Basic Principles on the Role of Lawyers.

Graterol was convicted and sentenced to six months in prison for 'obstruction of justice' in December 2012. His appeal was denied on 15 July 2013. At the time of writing, Graterol is waiting for a 'psychosocial' examination that will determine whether he shows sufficient remorse for his 'crime' and whether serve his sentence in prison or on conditional release.

The IBAHRI report can be downloaded in English and Spanish at tinyurl.com/IBA-Graterol-Report.

Somalia's Abukar Hassan Ahmed receives 2013 IBA Human Rights Award



Somali constitutional and international law professor Abukar Hassan Ahmed has been presented with the IBA Human Rights Award. The honour was conferred for his dedication to the fight for human rights and the rule of law in Somalia. During the brutal Siad Barre dictatorship (1969–1991) Professor Ahmed taught constitutional law, including curriculum on human

rights protection, at the Somali National University. He spoke out against the regime and defended people arrested for their political beliefs. As a result, Professor Ahmed endured arbitrary arrest, imprisonment and torture.

Watch the full Rule of Law Symposium, including Professor Ahmed's presentation here.

Sri Lanka bans human rights delegates from major Commonwealth meeting

REBECCA LOWE

Human rights groups accused Sri Lanka of heavy-handed censorship and undermining the values of the Commonwealth after an international law delegation was prevented from entering the country during the Commonwealth Heads of Government Meeting (CHOGM) in Colombo.

The delegates were due to attend a conference jointly hosted by the International Bar Association's Human Rights Institute (IBAHRI) and the Bar Association of Sri Lanka (BASL) on Commonwealth values and the rule of law.

Planned speakers, all of whom were originally granted visas, included the current and former UN Special Rapporteurs on the Independence of Judges and Lawyers, Gabriela Knaul and Dato' Param Cumaraswamy, and IBAHRI Senior Programme Lawyer Alex Wilks. However, the delegation was later told that entry would not be permitted.

Journalists who did manage to enter the country reported serious difficulties accessing CHOGM and speaking to officials.

Speaking to *Global Insight* before the event, Cumaraswamy urged the heads of governments attending the meeting to 'call for an emergency debate on this development'. He said: 'The theme of the IBAHRI conference is "making Commonwealth values a reality in the context of the rule of law and the independence of the legal profession". This is the very essence of the Commonwealth Charter. Thus, the Government's action should be seen as a clear violation of the Charter, denying freedom of expression through open dialogue.'

More than 50 state leaders attended CHOGM from 14 to 17 November, after which Sri Lanka became Chair of the Commonwealth, a position it will hold for two years. Several international NGOs urged a boycott of the event due to concerns about the nation's human rights record during and since the civil war in 2009.

Sri Lanka's Deputy High Commissioner to the UK, Neville de Silva, said the visas were revoked because BASL failed to follow the correct procedure for international seminars by obtaining prior approval from the Ministry of External Affairs. In a 6 November letter to the IBA, De Silva



Colombo, 14 November 2013: Sri Lanka's President Mahinda Rajapaksa (L) speaks to Commonwealth Secretary-General Kamallesh Sharma during a pre-CHOGM news conference

stated the Ministry was 'not in a position to facilitate' any international seminars and conferences during CHOGM due to stretched state resources, so it had put in place an 'embargoed period' between 20 October and 20 November.

In a statement released on 7 November, the Ministry said a previous letter outlining the reasons for the visa withdrawal had been copied to BASL in late August. The statement continued: 'It was further clarified that during this [CHOGM] period all the required resources will be fully utilised, resulting in practical difficulties in the conduct of any events with international participation, particularly with regard to the security and logistical aspects.' It added: 'It is abundantly clear that the organisers had the option of rescheduling their event outside this time frame.'

This is the second time IBAHRI has been denied access to Sri Lanka. In January, visas for a fact-finding mission were turned down due to alleged 'misinformation' on the application forms. The mission's final report, 'A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka', concluded that the removal of Bandaranayake from office was unlawful – something the country has strongly denied.

IBAHRI Co-Chair Sternford Moyovoice his frustration at the decision. By revoking the visas, Sri Lanka 'is demonstrating to the world its determination to block freedom of speech and independent discussion,' he said. 'If the Commonwealth is to have any relevance in today's world, it must act swiftly and decisively to ensure that Sri

Lanka engages meaningfully with human rights.'

According to the Commonwealth Charter, agreed in December 2012, member states are committed to human rights, freedom of expression and the rule of law. However, Sri Lanka has been accused of covering up state war crimes, eroding the power of the judiciary, forcibly 'disappearing' opponents, and harassing journalists, minorities and human rights activists.

UN High Commissioner for Human Rights Navi Pillay has reported that more than 30 journalists and activists have been murdered and countless others have disappeared over the past eight years, most without any investigation. In August, she declared the country was 'showing signs of heading in an increasingly authoritarian direction'.

Canada and India were the only countries that chose to boycott CHOGM. However, the Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association have all called for Sri Lanka to be suspended from the Commonwealth.

The Commonwealth Secretariat declined to comment on the visas, but Secretary-General Kamallesh Sharma defended the Colombo summit. In a November interview with Channel 4, he stressed the Commonwealth has been making progress to address human rights issues in Sri Lanka. 'In the time to come, I trust that people will see [...] that indeed very significant advances have been made in the interests of the people of Sri Lanka,' he said.



Madeleine

Speaking at the IBA Annual Conference in Boston on the day after alleged al-Qaeda operative Abu Anas al-Libi was rendered from Libya to stand trial for the bombings of US embassies in Africa in 1998, Madeleine Albright reflected on her worst day as US Secretary of State, the day the attacks took place.

During my years in office, the Balkans were a major focus, but they were not the only arena where the rule of law was on trial. My worst day as Secretary of State came 15 years ago, on 7 August 1998, when terrorist explosions struck the American embassies in Kenya and Tanzania, killing hundreds of people. Within a matter of days we had captured several suspects who led us to believe that Osama bin Laden was behind the attacks.

The question for us was whether to consider this a law enforcement matter demanding a judicial response, or a military attack in which the use of armed force was justified. We decided

it was both. We went ahead and prosecuted the conspirators we had in custody, but we also launched a cruise missile strike at terrorist training camps in Afghanistan, failing to hit bin Laden, we think, by only a matter of hours. At the same time, we sought international help in identifying and freezing terrorist funds, and we used a combination of law enforcement and intelligence to try to prevent further attacks.

It is indeed a coincidence that yesterday in Libya al-Libi was captured and it is very clear that we always need to hold people accountable. And as Secretary Kerry has said, people cannot hide from us and the law. So I think that there will be



Albright

additional questions; I've just been listening to the TV: some of the Libyans are saying that this was a kidnapping so this obviously will lead to additional questions and a lot of issues that we will deal with.

Urgent global concern

After 9/11, and in the years since, the threat posed by violent extremist groups has been a subject of urgent global concern, which some perceive in wholly religious terms. But this confrontation is not about beliefs, it's about behaviour; the law does not care what people think – the law cares what people do. And, when

terrorists fly airplanes into buildings or blow up a subway train or plant explosives in the middle of a crowd during the Boston marathon, they're trying to destroy the very idea of law. We cannot let them succeed.

Our task collectively is to ensure that the guilty are held accountable, but to do so in a way that upholds the principles upon which the rule of law is rightly based. We should also be careful about using such popular but problematic terms as 'the global war on terror'. I say this because it's hard to wage war against a noun, and because terrorists want nothing more than to be considered warriors, when in fact, they are murderers, and I for one do not wish to do them any favours.

Following her address, Madeleine Albright took questions from the audience.

Question: You're world-renowned for your voracious appetite for news; you reportedly read over 30 newspapers a day from around the world. You'll be aware of the little local difficulties we've had with our newspapers in England. Would you share your thoughts and comments on that in the larger scheme of free expression?

'When terrorists fly airplanes into buildings or blow up a subway train or plant explosives in the middle of a crowd during the Boston marathon, they're trying to destroy the very idea of law. We cannot let them succeed'

Madeleine Albright: I am very troubled by some of the things that are happening in the media generally – in terms of having taken this incredible medium that provides the possibility of information and turning it into scandal-mongering or eavesdropping, or a number of various aspects to it – and for me, what is absolutely essential in the functioning of a democratic society is for the media to in fact have an adversarial role with the government; that is part of what it's supposed to do, which is why in this country it's called the fourth estate. But also to do it in a responsible way, where people know what they can trust and not trust. I find it less comfortable to talk about the British media than our own, and I think that they in many ways have let down our population, and partially because some of them, especially the radio and television, in many ways is just a collection of facts from one group or another, not a balanced view, despite the fact that some say they're balanced. And what happens is that people only then listen to what it is that they already believe, and get strengthened in it. I personally, when I'm driving in Washington, listen to Rush Limbaugh, and it is quite amazing that I have not run over somebody or been arrested, yelling at my own car. But I do think it's important to try to get other views, but I also think that the media in any country has

a responsibility to provide facts and to give an overall view.

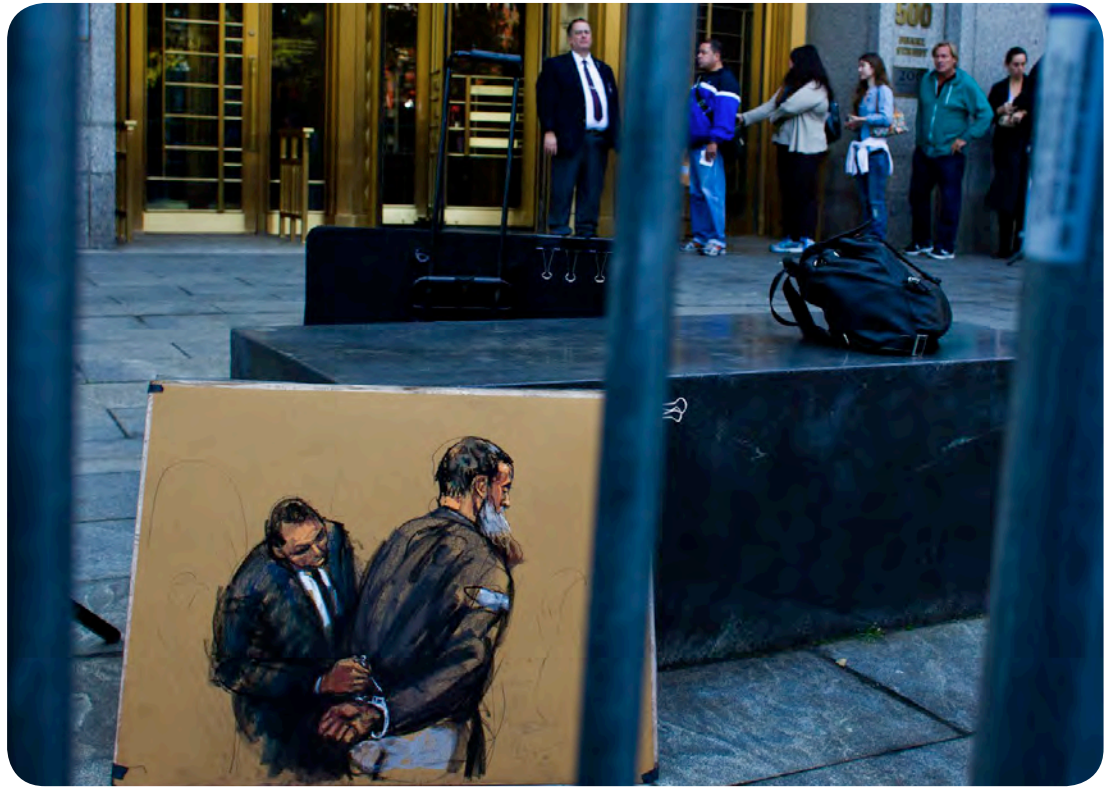
Q: When you look at this turbulent world that we now live in, with all the experience you've had, is there anything that above all keeps you awake at night?

MA: Well, yes, many. I've lived through a pretty turbulent time in my life, but I am a child that has not only lived through World War II but also in the post-World War II period, where, in fact, there was the creation of a lot of institutions, which were supposed to deal with the turbulence, that would allow us to have different views, to deal with the problem of nuclear proliferation, to deal with issues of poverty – obviously the United Nations [UN] and a variety of regional organisations.

What troubles me at the moment is that there is a real question as to whether the organisations work, whether they are properly suited for the 21st century. And the reason that I say that is that they are based on the concept of the nation state, which is something that we all grew up with. There is something new in the world today, which is non-state actors. And non-state actors are not just the terrorists. Non-state actors are also businesses and non-governmental organisations, and a variety of different stakeholders. And the non-state actors are never at the table, and I think we haven't quite figured out how to adjust the institutional structure in order to try to figure out how to make it work for the 21st century, because the problems are there.

One of the books that I wrote was called *Memo to the President Elect*, and at a time I didn't know who the president was going to be. I did, in the end, give it to President Obama, and I inscribed it, 'With the audacity to hope that this book might be useful'. And I in fact had five big umbrella issues that I thought would have to be dealt with. One was the proliferation of nuclear weapons, another was terrorism – how to fight terrorism and to make sure that the worst weapons didn't get into the hands of the worst people. Then there was the gap between the rich and the poor; in the world there are fewer poor people now in absolute terms, primarily because of what the Chinese have done, but the gap between the rich and the poor has widened – and thanks to technology the poor know what the rich have. Then there was the whole issue of energy and environment and pandemic disease. And then I really thought that it was important to restore the good name of democracy after it was militarised in Iraq. Those continue to be my concerns, but my main concern is that the system isn't working to deal with it.

Q: Is one of the problems the UN Security Council?



New York, 15 October 2013: a courtroom sketch shows Nazih al-Ragye, known by the alias 'Abu Anas al-Libi' as he appears in Manhattan Federal Court

MA: Yes, but that is one of the issues. ...I was at the UN, and it's very interesting. The Security Council initially had 11 members, then it was expanded to 15; and there were questions as to whether in fact its permanent members should be expanded. And so at the time that President Clinton was in office, we suggested that Germany and Japan be added as permanent members. I hope I'm not about to insult some people here, but the first country to come to me was Italy, and they said; this is outrageous, we lost the war too, which is not a great campaign slogan. So, then what would happen is that I would go – at any given time there were five Europeans on the Security Council – and I would go to a European ambassador and say, can you help me on X vote, and he'd say, 'I'm so sorry, I can't, the EU does not yet have a common position.' And then two days later I'd go back to the same person, I'd say, can you help me now, and he'd say, 'No, the EU does have a common position,' which means, frankly, that the EU should have one permanent seat; but I can't visualise either the British or the French giving up their seats. So, it's a Rubik's cube aspect of it, and it'll be interesting to see how it works on this whole Syria issue. What happened also to Kosovo: we knew that the Russians would veto it, and we took it out of the Security Council.

'I think the bottom line is, when a law has been presented and passed by congress, signed by the president, it's a little hard to keep saying that it hasn't happened'

Q: I have a real concern about the rule of law in the United States. We have a Supreme Court that often, when interpreting the constitution, in my opinion reads into it things that clearly were never intended when the provisions were originally adopted. President Obama has, with respect to certain laws, decided not to enforce them because he considers them unconstitutional, and now we're having the legislation that's being delayed by the executive branch, even though there's nothing in the law that would permit the executive branch to do that. I'm wondering if you have similar concerns about the rule of law in the United States?

IBA GLOBAL INSIGHT

tinyurl.com/ibaglobalinsight

in print

The IBA's flagship magazine is delivered to all members of the Association six times each year and is also available for subscription or individual purchase. It is also accessible online and in app format (see below).



in film



Elizabeth Rindskopf Parker, former General Counsel of the CIA and the US National Security Agency, discussed issues including the conflicts between safeguarding individual freedoms and fighting terrorism.



Robert Khuzami is the former Head of Enforcement at the US Securities and Exchange Commission (SEC). He spoke on SEC progress in combatting corruption and enforcing regulation in the wake of the financial crisis.



Bianca Jagger, leading environmentalist campaigner and Chair of the Bianca Jagger Human Rights Foundation, spoke on climate change, accountability and the law.

Full video coverage of the IBA Boston conference can be found at tinyurl.com/bostonfilms

The full list of IBA films is at tinyurl.com/ibafilms

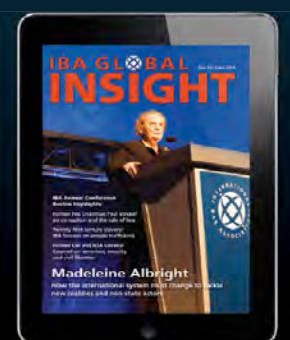
online

IBA *Global Insight* articles are available on the IBA website, www.ibanet.org, with extra features and navigability. Some articles are exclusive to the website.

tinyurl.com/ibaglobalinsight



on the move



Available on IOS devices through the Apple Appstore.

NOW also available for Windows 8 through the Windows Store.

NOW ON WINDOWS 8



MA: Well, I personally have concerns about the Supreme Court, and I do think that some of the rulings that they've made recently have been very troublesome in terms of some of the aspects

'The non-state actors are never at the table, and I think we haven't quite figured out how to adjust the institutional structure in order to try to figure out how to make it work for the 21st century'

of our democracy, but you're going to have Steven Breyer here, you can talk to him about it... I'm not a lawyer, but I am concerned about certain aspects of how our system is operating. I think that I have so believed in this system of government and our checks and balances, and the way that laws are written, created, legislated, and then implemented by the executive branch, and I think that there is a disconnect going on. It's hard not to be political at this moment, but I think the bottom line is, when a law has been presented and passed by congress, signed by the president, it's a little hard to keep saying that it hasn't happened. And so I think that there are a lot of questions at this moment.

Q: What do you think about immigration control? I think it's the worst form of protectionism, and against human rights, because all human beings are animals and should be allowed to go across the world without any borders. In 50 years time we can see that we have a borderless world?

MA: Well, let me just say: I'm an immigrant. And I happen to believe that people should be able to live where they can, and earn a living and at what they can. It is not something that is only America's fault; there are other countries that have very tight immigration rules. What I am worried about is also what I call now the international homeless: refugees. People that are driven out of their countries, that have no place to be. And I, this summer, was in Jordan and went to the camp of Syrian refugees – which is now the fourth largest city in Jordan – where people do not know how to live where they're going back, and so there's the combination of the right to be able to move, and the other to be driven out of your country where you have no place to live.

Q: In spite of 2014 approaching, still the rule of law is in question. And you just mentioned about Syria: they will move when there is President Assad using the chemical weapon, but 100,000 Syrians have been killed in the war – nothing happened. So, how can you explain this dual standard?

MA: This is obviously the question that the international community is dealing with now. I think I'm going to take a little while to answer this, because I have spent some time on it. One of the things I have done in my post-official life



Madeleine Albright with the Executive Director of the International Bar Association, Mark Ellis

'I personally have concerns about the Supreme Court, and I do think that some of the rulings that they've made recently have been very troublesome in terms of some of the aspects of our democracy'

is sit on a task force that dealt with prevention of genocide and crimes against humanity – [which] came out of my own experience dealing with the Balkans. And so one of the things that happened was that we suggested that in the American system that we have something called an atrocities prevention board within the National Security Council, that would give early warning of various problems. It's one of the first times that I've seen something from a task force actually become an institutional structure. After that I asked, along with an interesting man, Rich Williamson, who had been Governor Romney's Foreign Policy Adviser, to have a task force on a new concept called the responsibility to protect.

At the United Nations I had watched the evolution of peacekeeping from not just where you go into a country once peace had been arranged to keep the parties apart, but actively be involved in trying to help the peace process go along. And then the Canadians, who are truly responsible international citizens, came up with the concept of human security. And that then evolved into this concept of the responsibility to protect, that if a sovereign leader of a country not only does not protect his people, but is actually killing them, isn't it the responsibility of the international community to do something? So, accordingly, what I think is that the international community should have been looking some time ago at what was going on in Syria. I think what has made this issue particularly complicated is the real problem with the responsibility to protect, is who enforces this? Now, does it have to come according to the general assembly resolution; you do have to have security council approval, so you get yourself into kind of a cul-de-sac, and so I think the international community is trying to deal with this. I do think that the chemical weapons part is a whole level of horror that went on in Syria that needs to be dealt with, but I also think that the international community does have responsibility to do something about the

people that have been killed by other means, or have been pushed out of their own country.

Q: Can the United States though, play this leadership role in combating immunity and supporting accountability when they're not a state party to the International Criminal Court?

MA: Well, I happen to think, yes. Let me just explain a little bit where I thought that it was kind of a natural outgrowth of the war crimes tribunals for the former Yugoslavia and Rwanda, and when I was Secretary of State, David Scheffer, who worked with me, was our negotiator in Rome on the international criminal court... I regretted that we were not able to be a part of it early on. And part of it has to do with the fact that the United States had many responsibilities abroad, primarily with our military. What has been missed in this whole story is that it is possible if you've got a functional legal system of your own, not to submit things to the International Criminal Court; despite maybe the second question, I do think on the whole we have a functioning legal system. So, I think there has been more recognition of the fact that the ICC is moving along; the Bush administration did in fact think it had a role; so I do think, technically it may be difficult, but I think in terms of support for the concepts, I think, yes, we should. ☒



Portrait by Timothy Greenfield-Sanders



This is an edited version of the question and answer session that followed Madeleine Albright's keynote address to the opening ceremony of the IBA Annual Conference. The full version can be viewed on the IBA website: ibanet.org.



Paul Volcker: corruption and the rule of law

Addressing a packed audience in Boston, the former Fed Chairman emphasised the crippling effects of corruption on business, human rights and democracy, insisting that the legal profession must actively defend against corruption to avoid complicity.

I wondered about how a semi-retired financial guy like me is equipped to keynote an expert panel on corruption and the rule of law, but then, as I thought of the developments in the financial world recently, maybe it's obvious that I have a certain expertise.

Certainly we can't be insulated from the developments that we read about almost every day in the press, in the markets of greatest financial centre in the world. But it happens more broadly that the challenge before the panel is particularly timely for me, because for a long time I have been deeply concerned about the corrosive effects of corruption, both upon nations struggling to emerge economically, and upon the effectiveness of key financial institutions, and I include in that the United Nations itself.

These days, I don't have to look elsewhere for evidence of the debilitating impact of corruption, perceived and real, in eroding trust in government processes. It's true in the United States, it was true in the United States even before we somehow decided to shut the government down. It's also true with other relatively rich economies, presumably long imbued with the importance of the rule of law.

Vision, execution, hallucination

I recently undertook the initiative for a new institute that's come to be known as the Volcker Alliance. The central idea is to focus attention by practitioners, by academics, by the political class and by the public at large on the need for effective and efficient 'implementation' of public policies.

I emphasise the word 'implementation'. There's plenty of debate about what governments ought to do on grand policy, but the whole subject of management and administration seems to be in disarray and neglected. I ran across an apt quotation the other day from Thomas Edison, a century or so ago, which is still applicable. It says vision without execution is a hallucination. Too often, it shows up in poor performance, it all feeds the sense that government can't be trusted.

In any event, at the very first meeting with the directions of the Alliance, the conviction was strongly expressed to me that corruption had become the central issue of governance, it therefore called for priority attention. I readily agreed, so it was natural to place that issue front and centre in a conference that the Alliance convened last month in Salzburg.

We had some 40 scholars and administrators attending, drawn from government, universities and international institutions. I think it's fair to say that collectively, those attending reflected the concerns of both well developed and emerging economies in the effective implementation of public policies.

Yet, somewhat to my surprise, there were also strong warnings against committing investment of our limited financial and intellectual resources to the fight against corruption. Now, it wasn't because the issue was considered unimportant – to the contrary. The sense was widely shared that corruption was becoming more intractable, more pervasive, not less.

Breakdown in trust

You are no doubt familiar with the estimates that corruption might sometimes add 30 per cent or more to the cost of contracts and implementing internationally financed projects. Other estimates have been made that suggest a trillion dollars of transactions worldwide may be strongly tempted by corruption every year. There is evidence that funds, for a significant number of international and national assistance programmes, are simply wasted. The adverse consequences are not simply on the direct financial losses and inefficiencies involved, but a breakdown in the sense of trust essential to effective democratic, or for that matter, any government.

It's worth noting that the two nations with the largest populations located side by side in Asia, one a turbulent democracy, the other a one-party state, are both riled by corruption. In both cases, it threatens their ability to sustain rapid growth as well as political stability.

So it was not the relevance, but the size of the challenge that seemed forbidding to a number of the Salzburg conference participants. The extent and nature of the problem, deeply embedded in national habits, often supported by local business and financial interests, in some cases tied into the production and distribution of drugs.

It is of course these considerations that raise questions about the rule of law. A point no





‘A prestigious group of lawyers: you carry the full weight of a long respected and honoured tradition. If we fail to maintain an effective rule of law and a strong defence against corruption... you can hardly escape complicity’

doubt known to many of you is that corruption cannot be combated successfully without a strong commitment to the rule of law. That’s a matter of prime significance for lawyers in their professional organisations, not for a tiny new institute, however ambitious, with a number of more manageable priorities.

There is continuing research that has firmly established that a combination of a weak rule of law and perceived corruption is closely associated with stunted economic development, presents seemingly pervasive obstacles to an escape from poverty and is accompanied by an absence of human rights.

More positively, there’s a sense that with a tradition of the rule of law, with relative freedom

from corruption, confidence in government booms. So I’m not quite ready for the Volcker Alliance to abdicate. The relevant question for us is identifying, at the margin, where we can gain a better leverage.

Are, for instance, our schools of public policy and administration paying attention to the need for educating and training in corruption prevention? I might ask the same question of our distinguished schools of law: are there promising areas for research that need support? Do reform-minded governments, whether they happen to be cities in the United States, or nations just entering the market economy, have access to appropriate frameworks and well tested procedures for preventing and attacking corruption?

There are, after all, success stories. Historically, we look to Singapore and Hong Kong. Much more recently, Colombia in South America and the Philippines in Asia, as well as some American localities. We know too that these days, elections frequently are fought on promises to deal with corruption. But we also know that winning an election is not tantamount to success in attacking corruption. Too often, deep seated cultural

‘There’s plenty of debate about what governments ought to do on grand policy... I ran across an apt quotation the other day from Thomas Edison, a century or so ago, which is still applicable. It says vision without execution is a hallucination’

patterns, financial pressures and corrupt electoral practices themselves intercede.

Now, as I thought about this panel and what to say, I realised we were faced with some semantic and conceptual confusion. I took refuge in my dictionaries. I found ‘corruption’ is consistently defined as ‘the result of corrupt acts’. It didn’t help me very much. I took to ‘crook’. Corrupt actions are principally defined and [unclear] in these dictionaries as bribing public officials, which I think we would all agree with, but isn’t it more sweeping than that? The definitions then do proceed with words such as ‘immorality’, ‘dishonesty’, ‘lack of integrity’.

In contrast, ‘rule of law’: unlike ‘rule of thumb’, a ‘rule of law’ is not defined in my dictionaries, interestingly enough. Apparently Noah Webster was not familiar with the rule of law. But the word ‘rule’ alone does seem to come close, implying a governing principle embodied in legislation or observed in practice. And we add the concepts of consistency and transparency and we come close to the approaches formalised in both the OECD [Organisation for Economic Co-operation and Development] Anti-Bribery Convention,

and more broadly, the UN Convention against Corruption.

I have great respect for the continuing efforts of the OECD over more than a decade, to develop and enforce national efforts; to outlaw bribery of foreign public officials. Importantly in that case, there are provisions for the act of monitoring of both legislation and enforcement in the 40 signatory nations. That Convention follows closely the precedent of the American Foreign and Corrupt Practices Act that became law more than a quarter of a century ago.

The UN Convention is more recent, entering into force in 2005. It now has, nominally anyway, 168 countries as partners. It is, as written, the most comprehensive approach, and extends way beyond criminalising bribery to other corrupt actions and money laundering. Extensive record-keeping and broad codes of conduct for civil servants are required, indeed requiring honourable and proper performance of public functions, I quote, including fair and transparent government procurement systems, the Convention comes close to defining the essence of the rule of law.

Defend against corruption, avoid complicity

So where in practice do we stand? At the least, with reasonable clarity, bribery of foreign officials has been outlawed in most countries. The complementary efforts of the World Bank, now increasingly joined by other multi-national institutions, has improved vigilance over the use of their own resources. One result is evident in identification of increased numbers of banks’ contractors engaged in corrupt activity.

‘The combination of a weak rule of law and corruption is not only economically debilitating, but threatening the political health of both new and old democracies’

A broader change in attitudes has been highlighted by the *Siemens* case of large-scale bribery, leading not only to huge fines, but to a reversal of the former leniency of the German government towards bribing foreign officials by

its companies. The United States Department of Justice has clearly been more active. It was notably the case in pursuing American companies involved in abuses of the UN Oil for Food programme a decade ago. The number of disbarments of those corrupting World Bank procurement procedures have grown, along with a complementary approach among related international institutions.

But can any of us feel satisfied that those examples are sufficient, that we don't need to do more? Those examples only touch the surface of illicit behaviour. There are many countries, important countries, that in my personal experience, don't even seem to try. We had the *Siemens* case in Germany, we had on the other hand, the rather infamous case in Britain, where huge bribes were paid to assure large contracts in a foreign country, and they were not pursued to a definitive conclusion because it was stated in the end there were more important things than the rule of law.

I am certain those international agreements and activities, together with the sporadic evidence of a more aggressive approach by some individual countries, have by no means relieved the sense of frustration and alarm with which I began these remarks. In my own experience, with respect to both the inquiry I chaired into the administration of the Oil for Food programme at the UN, and my subsequent review of World Bank practices, I have been exposed to the deep-seated resistance to effective action, even by those most affected international institutions and by important member nations. It was only in the mid-1990s that a brave World Bank president took the position that, and I quote, corruption is a cancer on development. He said that his institution could no longer dodge the issue. Now the Bank and the OECD, both under strong leadership, have come a long way from the old attitude, that corruption is now our business. There is frank recognition that the combination of a weak rule of law and corruption is not only economically debilitating, but threatening the political health of both new and old democracies.

I do not exclude the United States. We think of ourselves as exemplars of the rule of law. We are certainly world champions in the extent of legislation and regulation governing bribery,

conflicts of interest, procurement procedures, campaign financing, protection of human rights and most of all, transparency. All of these are ingredients of what some think of as the rule of law. But we still face the sad fact that in the United States itself, the perception of our own citizens of corruption has increased, increased to the point that according to the most recent Gallup World Poll, only a quarter of Americans themselves believe that corruption is not widespread in our country.

'The conviction was strongly expressed to me that corruption had become the central issue of governance, it therefore called for priority attention'

My feeling is that the impression of serious corruption has increased further, a reflection largely of the concern that campaign financing has come to gravely distort the political process.

Shouldn't we be satisfied that we live with a really effective rule of law, when the perceived need for heavy campaign spending has come to dominate our political process? We let those financing practices infringe in a very basic way upon the rule of law, with its sense of even handedness and openness. Does it not breed behaviour that is accomplished by any reasonable definition of corruption?

I made the point earlier that the successful attack on corruption depends upon a strong sense of rule of law, but it's equally true that widespread corruption makes a strong rule of law an impossible dream. But here I am, addressing a prestigious group of lawyers: you carry the full weight of a long respected and honoured tradition. If we fail to maintain an effective rule of law and a strong defence against corruption, two sides of the same coin, then you can hardly escape complicity. ☒



This is an edited version of Paul Volcker's address at the IBA Annual Conference in Boston. The full version can be viewed at ibanet.org.

GCR | USA

The local perspective from the
global experts you trust.



The writers at Global Competition Review now bring you GCR USA;
the new online daily service providing in-depth analysis of American
litigation and regulation.

Subscribe to:

- **Keep up to date** with the people, policies and cases that shape American antitrust
- **Gain clarity** on key topics, from high stakes litigation to agency investigations
- **Expand your knowledge** with original in-depth analysis, written by experts you can trust

Sign up now for a unique view of the American litigation landscape.

+44 207 908 9228
subscriptions@globalcompetitionreview.com
www.globalcompetitionreview.com



Washington DC, 8 October 2013: furloughed AmeriCorps employee Jeffrey Wismer sits alone on the National Mall as he calls on Congress to end the government shutdown

US government shutdown

The shutdown has damaged America's reputation globally, prompting China to call for a de-Americanised world. But the abject governance failure, with widespread human rights consequences, is likely to be repeated in a matter of months.

JOEL BRINKLEY

The day before the United States government shut down at the end of September, dozens of tourists watched a 15-minute introductory video at the start of a US Capitol tour. 'This is the core, the center of our government, our national stage' the narrator intoned. 'Congress is where we can find our common ground.'

Ten days later, Representative Carol Shea-Porter stood at the rostrum in the House of Representatives and scolded her colleagues: 'I remember when it used to be considered a problem that we were passing a continuing resolution,' a current-year budget extension, 'instead of actually passing' the new budget.

'This is an abject failure of governance.'

The US government shutdown lasted 16 days after Republicans refused to pass a continuing resolution, or a new budget, unless President Barack Obama agreed to gut his signature near-universal health care law, the Affordable Care Act. For decades, the US had remained the only advanced nation worldwide without universal health care.

Obama, of course, refused even to discuss that demand, and that led to the shutdown – the first in American history brought on by a disagreement over policy, not spending.

It's over, but the fear now is that the abject governance failure is likely to repeat itself,

as early as January or February; the final agreement that reopened the government simply put off the debates for a couple of months, and no one seems to have softened their position.

‘The battle lines remain the same,’ Louisiana Representative John Fleming, a Tea Party Republican, told reporters a few days after the government reopened. ‘If you think about it, we fought this to a stalemate.’

Shutdown as human rights failure

Already, however, the shutdown has caused significant economic damage – and not just to the US. American trading partners were hurt too – as has been America’s reputation around the world. Watching this, China

working and living conditions. Aren’t those human rights failures?

Sixteen days may not seem like a long time. But think about the 800,000 people who were put on leave during that time, with no pay. What happens to the restaurants, drug stores, bars, coffee shops and other businesses located near these government offices?

How about the programme that offers government guarantees for 30 per cent of all new home loans – shut down for 16 days, damaging the housing market that is so central to the US economy. (It was the collapse of the US housing market that set off the great recession of 2008.)

The shutdown was like the ice that slowly covers a lake in freezing weather. By the end, it had spread throughout the entire US

‘Americans never call social problems in their own country “human rights” abuses. But if India or Cambodia suddenly curtailed a programme to feed and educate young children from low-income families for 16 days, Americans would describe that as a human-rights failure’

actually called for a ‘de-Americanized world,’ as the government news service *Xinhua*, wrote, ‘so that the international community could permanently stay away from the spillover of the intensifying political turmoil in the United States.’

Americans never call social problems in their own country ‘human rights’ abuses. But if India or Cambodia suddenly curtailed a programme to feed and educate young children from low-income families for 16 days, many Americans would describe that as a human-rights failure.

So isn’t it reasonable to view the curtailment of the Head Start Program that provides those services to low-income American children a human-rights failure? A similar conclusion could be drawn from the suspension of a special nutritional-supplement programme for poor, pregnant women and their infant children – along with other programmes of that sort as well. And what happens when the government’s industrial Chemical Safety and Hazard Investigation Board shuts down, and the Food and Drug Administration suspends food inspections – like so many other government agencies that monitor unsafe

economy. Standard & Poor’s, the fiscal rating service, said it cost the US economy \$24bn and will shave at least 0.6 per cent from the nations’ fourth quarter GDP growth.

Democratic deficit

As many Americans see it, the wholesale governance failure has simply been put on pause. A *Washington Post/ABC News* poll in late October found that only 21 per cent of Americans approved of the Congressional Republicans’ handling the budget debate. But one fact stands out: Many Republicans represent congressional districts that are so solidly Republican – ‘deep red’, in American parlance – that there’s no chance they’ll be replaced. That’s also true for most of the Tea Party, the prime obstructionists who brought on the shutdown – even though the Tea Party’s own website notes that only 8.7 million Americans are what they call ‘tea drinkers’. (less than three per cent of the population). It’s easy to question a system of governance that allows a tiny minority to cause so much havoc.



Guaynabo, on the outskirts of San Juan, Puerto Rico, 8 October 2013: US federal workers protest against the shutdown outside the City View Plaza building which houses local offices of the Social Security Administration, National Parks and the Internal Revenue Service

The minority's central goal is to set the US on the same path Europe has suffered through in recent years, austerity budgeting – though its deliberately not call it that. Just after the shutdown ended, the Congressional Budget Office warned that the so-called sequester, a previous Republican-mandated budget cut of \$238.6bn per year, will 'cost the economy 800,000 jobs next year.'

Cutting the budget while an economy is weak is widely regarded as utterly foolish as it causes lay-offs and greater unemployment that spreads through the economy, creating poverty and further human rights failings. In late October, Greece's president swore that his country cannot accept any more austerity measures, saying, 'this must be appreciated by Europe. Greek people cannot give any more.'

Under austerity plans, as most Europeans know all too well, governments must radically reduce spending. How do they do that? They buy fewer goods and reduce government services. Well, manufacturers sell those goods, people provide the services. When the government cuts back, the companies and manufacturers lose significant income. So they have to lay off large numbers of workers. That reduces the government's income-tax revenues, raises the nation's unemployment rate and increases unemployment-benefit payments.

All of this ricochets through the economy. Other businesses suffer, too, because

consumers have less money to spend. 'We are baffled by the idea that the pace of deficit reduction needs to be increased,' Ian Shepherdson, Chief Economist for Pantheon Macroeconomics in New York, said in a note to his clients in October.

In the US, another fall-out of the shutdown is a precipitous drop in consumer confidence, the sharpest in many years. Most Americans now view the federal government as incompetent at least, malicious at worst, at handling the nation's finances.

At the end of last May, Americans had the highest level of confidence in the US economy since the Great Recession began five years ago. By the end of the shutdown it dropped by 85 per cent to the lowest level since that recession of 2008. When the public holds no faith in the economy, people are less likely to spend their money – afraid of what is to come.

But Americans should hope that their fellow citizens realise how much damage has been wrought on the country's population, its economy, governance and international reputation. And, if so, they must hope that the abject governance failure that has led in turn to the failure to meet fundamental human rights, will be rectified sooner rather than later. ☒

Joel Brinkley, a professor of journalism at Stanford University, is a Pulitzer Prize-winning former foreign correspondent for *The New York Times*.

Battling co

Armed groups rely on gold and other precious minerals to fund violence and, in 2010, US legislation aimed to break this connection. Following calls for a new European law to go even further, *Global Insight* reports on the growing battle against conflict minerals.

REBECCA LOWE

This time last year, a group of militia surged into Goma in the Democratic Republic of Congo (DRC), murdered 24 residents and violently raped at least 36 women and girls. The victims of the sexual assault included 18 wives of army soldiers and one ten-year-old girl, who later died from her wounds.

Such atrocities are not uncommon in eastern DRC, where insurgents and soldiers have raped, murdered and looted their way across the region for decades. To support such activities they have plundered the state's vast mineral wealth, reported to be a staggering \$24tn. In 2011, the United Nations (UN) Group of Experts for the DRC estimated that the M23 militia leader General Bosco Ntaganda was earning \$15,000 a week from the minerals trade alone – minerals that slip down the supply chain into jewellery, mobile phones and other electronic goods used by consumers across the world.

Awareness is slowly growing about the connection between conflict and natural resources in the DRC. Yet this is far from the only region in the world where armed groups have preyed on the mining sector to maintain their grip on power. Over the past 60 years, at least 40 per cent of all intrastate conflicts have had links to mineral wealth, according to the UN Environment Programme. In Colombia, where conflict has cost over 218,000 lives and displaced up to 5.7 million people, FARC militia reportedly derive up to a fifth of their wealth from the gold trade.

In the US, section 1502 of the 2010 US Dodd-Frank Act has attempted to tackle the problem in the DRC and neighbouring countries by requiring listed companies whose products rely on minerals derived from the region (namely,

gold and the 'three Ts' – tin, tungsten and tantalum) to check their supply chain and label it as 'conflict free' or 'not conflict free'. While admirable in intent, the law's narrow scope has earned it significant criticism, with many believing it unfairly stigmatises Central African states and encourages companies to withdraw their business rather than engage with problems when they arise.

Now a lobby of international NGOs, led by Global Witness, is pushing European lawmakers to do better. Using Dodd-Frank as a platform, the group is urging the EU to adopt new wide-reaching legislation that builds on section 1502 while addressing some of its flaws. The proposed law would require EU businesses whose products contain natural resources from any conflict region in the world to undertake supply chain due diligence that meets Organisation for Economic Co-operation and Development (OECD) guidelines. It would not apply to every company, but only those placing products on the market for the first time.

Convincing the European community to accept such legislation will not be easy. But Global Witness Campaign Leader Annie Dunnebacke is adamant corporate attitudes must change. 'It's about companies adjusting the way they do business,' she says. 'We're not saying stop buying from these regions, we're just asking them to check they aren't funding violence in the process.'

Lifting the embargo

Concerns about section 1502's impact on the Congolese mining trade are not unfounded. While not solely due to Dodd-Frank – a

nflict



Manica Province
Mozambique, 18 September
2010: a gold miner climbs
down into a mine shaft near
the Zimbabwe border

REUTERS/Goran Tomasevic



presidential mining ban from 2010 to 2011 and new regulation under the 2011 Conflict Free Smelter (CFS) programme also contributed – international buyers fled from the region in droves after the law came into effect, creating what some have described as a ‘de facto embargo’. The extra due diligence required for companies engaged in the region was not worth it, many felt.

‘The EU legislation presents an opportunity to get right some of the things that Dodd-Frank didn’t,’ says Gregory Mthembu-Salter, a former member of the UN Group of Experts. ‘What you really want in conflict situations is for the company to engage with the authorities to get the armed group out. But what happens under Dodd-Frank is that if you get involved in a situation, you have to declare these minerals are not conflict free – so you are encouraged to walk away. It’s a nuclear option.’

The European legislation has been designed to make it harder for companies to abscond: its global remit creates added pressure to stand firm, while its focus on ‘process’ over ‘product’ means companies do not need to pigeonhole their merchandise with polarising labels. Instead, companies are required to disclose their supply chain due diligence mechanisms, with sanctions for non-compliance. ‘Ours is a risk-based approach based on mitigation, not labelling,’ says Global Witness campaigner Sophia Pickles. ‘If companies find there is an egregious human rights abuse taking place or a clear case of conflict financing then they have to stop sourcing from that mine, but not from the whole of Katanga or Kivu.’

For Brad Brooks-Rubin, former Special Advisor for Conflict Diamonds in the US Department of State, there is a concern that the EU regulation may be going too fast too soon. Now representing the industry as counsel at US law firm Holland & Hart, Brooks-Rubin believes companies may still be incentivised to abandon difficult regions until they have time to put more effective due diligence systems in place. In the meantime, more needs to be done to reward companies that choose to engage positively in conflict zones, he says, such as tax breaks or contractual benefits. ‘The worry of a lot of companies is if the EU regulation goes too far afield from what is happening to implement Dodd Frank, which might take away from the efforts they are making now. The question is whether these companies are ready to go beyond the three Ts and gold, and whether they are ready for a global scope, and these are big questions.’

Dunnebacke stresses, however, that the new measures should complement, not contradict, those already in place. The common factor is the reliance of both laws on the OECD due diligence framework. ‘We’re pushing the EU to pass a law that mirrors what companies are already required to do in the US,’ she says.

Going for gold

Industry groups have long maintained that conflict minerals legislation is unnecessary and burdensome. Voluntary measures are more efficient and effective, they argue, and more likely to encourage companies to go beyond

Manica Province, Mozambique, near the Zimbabwe border: a muddied prospector pans for gold

'It's about companies adjusting the way they conduct business. We're not saying stop buying from these regions, we're just asking them to check they aren't funding violence in the process'

Annie Dunnebacke
Campaign Leader, Global Witness

a mere box-ticking exercise. Indeed, several market-led initiatives have had a noticeable impact on cleaning up supply chains, including the London Bullion Market Association's Responsible Gold Guidance, the electronics industry's CFS programme and the World Gold Council's Conflict-Free Gold Standard.

Yet despite these efforts, conflict minerals are still working their way onto the high street. Finding a truly conflict-free smartphone or laptop is a near impossibility, and all but the most technologically retrograde consumers are complicit (see feature in this edition: **Twenty-first century slavery**, p 42). According to an October 2013 survey by the Centre for Research on Multinational Corporations (SOMO), European companies are not yet doing a great deal to improve the situation: of the 186 businesses examined that use the three Ts and gold, 80 per cent reportedly did not have publically available mineral sourcing policies.

'Historically, mandating good corporate

behaviour is a more effective tool than hoping companies will volunteer this information,' says Payal Sampat, International Campaigns Director at Earthworks, one of the NGOs supporting the new law. 'Despite years of NGO campaigns, reports, UN investigations and UN sanctions, companies were not disclosing supply chain information. Only legislation – the precedent set by Dodd-Frank – has changed this.'

The Tin Supply Chain Initiative (iTSCi), currently underway in the DRC and Rwanda, helps participants abide by their Dodd-Frank and OECD obligations. The scheme uses a traceability mechanism to track the three Ts from mines to smelters, and has enjoyed some success. While in more isolated areas, trade remains all but non-existent, in places where iTSCi has been implemented, such as Katanga and South Kivu, international business is slowly beginning to return. Governance has improved too: state officials are beginning to realise that regulation can improve their revenue, and in 2012 legislation requiring companies to undertake due diligence based on OECD standards was introduced.

However, there is currently no iTSCi equivalent for gold. In contrast to the three Ts, which can be traced without too much difficulty, gold can be smuggled out of mines in tiny quantities and readily converted into money. 'The gold sector is a total wild west,' concedes Mthemba-Salter. 'The army's got a finger in the pie, the local politicians, the deputies... everyone. With tin, it is now quite hard to sell stuff without tags; that's why the Chinese can buy it at a discount. The big challenge is how to apply that to gold.'

The vast bulk of DRC gold is not exported legally but smuggled across the border to



Think again...



www.legal500.com



Mongbwalu, Democratic Republic of Congo, 27 March 2006: a boy sorts through rocks while looking for gold at a mine

neighbouring states such as Rwanda, Uganda and Burundi, where its origin is disguised before being sent on to the United Arab Emirates. It is here, says Pickles, that the problem can be tackled. If Dubai launched a crackdown on laundered goods, the demand for smuggling operations would slowly dry up. 'Dubai requires you to have a waybill to show where the gold came from, but there are no due diligence checks required,' she explains. 'So you need to start here and start asking hard questions: if you haven't got the documentation and can't prove to me you've conducted due diligence along your supply chain, I'm not buying your gold.'

In April 2012, the Dubai Multi Commodities Centre adopted new due diligence standards based on OECD guidance. Pickles doubts this will have too much impact over the next couple of years, but is hopeful for the future. 'Over the past four years I've seen global pressure on Dubai increase five-fold, so it's changing.'

'The EU legislation presents an opportunity to get right some of the things that Dodd-Frank didn't'

Gregory Mthembu-Salter
Former member of the UN Group of Experts

Gun to their heads

The stakeholders most affected by new legislation will not be companies, consumers or commodities centres, however, but those doing the dirty work on their behalf: the artisanal miners. In the DRC, almost all mining activity is carried out informally, and often illegally, by more than 500,000 artisanal miners that rely on the trade to survive. While it is a gruelling and unrewarding life – such groups are vulnerable to exploitation by armed militia, who regularly pillage sites, impose punitive taxation and encourage child labour – any attempt to regulate the system risks cutting workers off from their only source of income.

Gaetano Cavalieri, President of the World Jewellery Confederation, speaks for many in the industry when he emphasises the importance of 'diplomatic and political' initiatives over binding regulation. 'Tacking conflict minerals without addressing the root causes of the conflict is tantamount to treating the symptoms but not the disease,' he says. 'That does not mean that conflict minerals need to be ignored, but without providing political solutions, the factors that give rise to the incidence of conflict minerals remain.'

Tricia Feeney, Executive Director of Rights and Accountability in Development (RAID), believes Congolese artisanal miners have been poorly treated by regulatory initiatives to date. The iTSCi auditing system is expensive and unreliable, she says, and has encouraged 'closed pipeline' supply chains of accredited traders

that monopolise the industry and drag down prices. 'We should be realistic about what due diligence can deliver in terms of human rights,' she adds. 'Conditions at the mine sites we visited in Katanga in 2012 and 2013 were no better than those documented by NGOs in the cobalt sector in the southern part of the province. We found numerous instances of children working and young women with infants on their backs washing minerals in the streams. These problems have not prevented iTSCI auditors from validating the sites for the scheme.'

Current traceability systems clearly need further improvement. But this will only happen under pressure from legislation, says Pickles. She believes strongly that development projects must accompany regulatory initiatives – but stresses they are not mutually exclusive. Regulation should ultimately benefit indigenous communities in the long-term, she says. 'Nobody is investing in these communities, so they are not seeing any return.' 'In some areas in the Kivus, where armed groups are present, the average daily wage for an artisanal miner is less than a dollar a day. Miners and traders I've spoken to see cleaning up supply chains as an incentive to get rid of the men with the guns out of their mine sites. The bottom line is that they would like to sell their minerals without a gun to their heads.'

Capturing the zeitgeist

Despite its best efforts, Global Witness is not confident its proposed legislation will pass. Powerful lobbyists from the electronics, jewellery and automobile industries have voiced their fervent opposition, and German manufacturers, represented by the Federation of German Industries and Federal Ministry of Economics and Technology, have pushed back hard.

Largely because of these efforts, a diluted version of the law dealing only with the three Ts and gold, and targeting only European smelters – which form under 4.5 per cent of the global smelting community – is looking more likely. There is also talk of replacing legally binding provisions with undefined 'voluntary modalities', which would be a big blow for those calling for greater corporate accountability.

'There's been pushback, mainly from manufacturers and big end-user companies, which was also the case with Dodd-Frank,' says Sampat. 'We just hope that far-sighted companies will want to be leaders in helping to curb the worst abuses associated with mining rather than fight basic provisions to clean up their supply chains.'

'By being proactive, companies are better able to anticipate human rights issues and defend against allegations of complicity in abuses'

Stéphane Brabant

Herbert Smith Freehills energy partner and Co-Chair of the IBA's Corporate Social Responsibility Committee

Stéphane Brabant, Herbert Smith Freehills energy partner and Co-Chair of the International Bar Association CSR Committee, agrees it's time for companies to step up to the mark. 'No company wants to be faced with allegations that its use of minerals has funded conflict and contributed to human rights violations,' he says. 'Such allegations would damage the reputation of the company and ultimately the success of the business [...]. By being proactive, companies are better able to anticipate human rights issues and defend against allegations of complicity in abuses.'

For Mthembu-Salter, it is only a matter of time before industry groups are forced to take notice; the public mood, he stresses, is changing. 'It's the zeitgeist. It's like organic meat: people want to know what's in these products, where they come from. Mining and tech companies never thought people would care about that so they haven't orientated their systems around it. But now they are going to have to.' ☒





After colonialism and the dictators comes Africa's third liberation

While Western eyes view Robert Mugabe as a vote-rigging dictator, many in Africa see him as a liberation hero, standing up to colonialism. A 'third liberation' through economic development must allow Africans to set their own agendas.

KAREN MACGREGOR

More than a decade ago, as Zimbabwe reeled under a violent crackdown against an emerging political opposition and state-sponsored invasions of white-owned farms, I stood on the steps of the People's Palace in Kinshasa and watched thousands of people roar with rapturous approval as Robert Mugabe arrived at the funeral of assassinated Congolese president Laurent Kabila.

Yes, Mugabe was a liberation hero, a leader of the struggle against colonialism. One of Africa's Big Men – and one who in the early years of power had driven improvements in the lives of the majority of Zimbabweans, especially in education.

But why were people cheering a ruler whose security forces were now harassing and killing citizens for their political views, who was ejecting commercial farmers and thus undermining food security, and who was reversing – through oppressive new legislation, and disregard for the rule of law – the rights and freedoms the struggle fought so hard to achieve? For how long can liberation credentials trump citizen rights?

The question of why so many liberation leaders became oppressors is vexing. Especially since the political platforms of post-colonial leaders were founded on rights, democracy and the rule of law. What went wrong, why and how?

Vote rigging and continuing crisis

Mugabe, who has been ruling Zimbabwe since independence from former colonial power Britain in 1980, retained power in yet another contested election in July.

There were credible claims of rigging, but nevertheless Mugabe and his Zanu-PF party 'won' decisively – 61 per cent of the vote against 33 per cent for the opposition, and 150 of 210 seats in parliament, a two-thirds majority that enables Zanu-PF to change the constitution. The constitution, legislation and the rule of law have been at the heart of Zimbabwe's more than decade-long crisis.

It was popular rejection in a 1999 referendum of constitutional reforms proposed by Mugabe and Zanu-PF that unleashed their fury against a nascent opposition, the Movement for Democratic Change (MDC). And it was through subsequent, ever-more draconian legislation and disregard for the rule of law that the ruling party violently smashed the MDC, threw farmers off the land, and rigged polls, enabling Mugabe to retain power.

At the recent opening of parliament on 15 September, Mugabe announced the legislative agenda. However, wrote *The Financial Gazette's* Clemence Manyukwe, he did not herald 'long-awaited revision of media and security legislation aimed at granting citizens greater liberties'.

The president said parliament would align existing laws to the new constitution, including in the areas of labour, education, health and 'indigenisation' – transferring ownership of the economy to black Zimbabweans (in the past, those in or close to Zanu-PF and the security forces).

Manyukwe wrote that there had been no mention of revising the Access to Information and Protection of Privacy Act (AIPPA), the Broadcasting Services Act or the Public Order and Security Act (POSA), which had been used to shut down newspapers, ensure state monopoly of television and clamp down on political parties, unions and residents' associations.

He quoted Dhewa Mavhinga, a senior researcher for Human Rights Watch, who said that progressive policies should be founded on democracy, rule of law and human rights, and parliament should 'swiftly' revise AIPPA and POSA and guarantee fundamental freedoms.

There is little chance of that happening, or of rule of law being reinstated or adhered to by the security forces, Zanu-PF or its supporters, or of the justice system being restored: breakdown of the rule of law in Zimbabwe notoriously included the government ignoring court rulings.

Richard Dowden, director of the Royal African Society and author of *Africa: Altered States, Ordinary Miracles* suggests that the only reason Mugabe called an election was that he knew he

would win – even if only by manipulating rolls, managing stations, shutting down mobile phones and denying the huge diaspora the vote. 'Power – military, political, bureaucratic – is what he understands, loves and has enjoyed for 33 years. It's more than love – it's an addiction,' Dowden says. Mugabe would leave power only when he wanted to, 'or when his body gives out'.

During more than half a century of post-colonial rule, millions of Africans have been killed, displaced and impoverished by poor leadership, lack of rights and the rule of law. It remains to be seen whether money through economic growth will finally set Africa free'

Upsetting the Big Men

Dowden argues that Africa does not like to upset Big Men such as Mugabe – 'I will vote for him because he is president' has been heard in many elections. And then there is the historically ambivalent relationship with the West. 'I suspect, many middle-class Africans throughout the continent and the world will stealthily clench a fist and whisper "yesssss" – without of course agreeing with what he has done to Zimbabwe.'

Mugabe had stood up to former colonial powers and won. 'Many people in Africa feel that the relationship is still not one of equality: multiparty democracy has been imposed, resource nationalism is blocked by a Western-controlled economic system and attitudes to Africa are still patronising and sometimes bullying.'

At the People's Palace in Kinshasa it became clear when a bus transporting Western journalists and diplomats from Kabila's funeral was attacked by a massive crowd, whose cheering had turned to rage, that hatred of colonialism still runs deep. For many Africans, half a century later, over-throwing colonialism trumps the failings of liberation leaders.

Writing in the *Times of Swaziland* on this year's 50th anniversary of the Organization of African Unity, predecessor of the African Union, Vusi Sibisi, argued that following independence there was merely a changing of the guard in which colonial masters were replaced by indigenous regimes that left oppressive laws created under colonialism in place, laws that were 'used and abused' by the new leaders. 'To this day, this continent is punctuated by pockets of countries where a host of colonial laws exclusively created to oppress the indigenous

peoples, remain in force.'

Ghanian economist George Ayittey, President of the Free Africa Foundation in Washington DC and author of *Africa Unchained: Defeating Dictators*, put forward three reasons why post-colonial African leaders cling to power. First, they came to believe that their countries belonged to them (and their families) as liberators, whether from colonialism or later from corruption or tyranny. 'Having won independence from colonial rule, they were hailed as heroes and deified.' Leaders came to believe they were the state.

Many took on grand titles and plastered their presence on currency, portraits, streets and buildings. Examples were Uganda's Idi Amin, DRC's Mobutu Sese Seko and Guinea's Ahmed Sékou Touré. Many of the next generation, some of them coup leaders, were worse than those they ousted: Liberia's Charles Taylor and DRC's Kabila being just two.

Secondly, wrote Ayittey, insecure leaders surrounded themselves with loyal supporters, often from their own tribes. Other supporters were 'bought', such as soldiers with high pay and opposition leaders with posts and flashy cars. Top supporters were allowed to do business using political connections. Mugabe's security chiefs became rich plundering the DRC and stealing diamonds.


'Even when the head of state is contemplating stepping down, these supporters and lackeys fiercely resist any cutbacks in government largesse or any attempt to open up the political system – for fear of losing the jobs, perks and privileges.'

The third reason is fear, according to Ayittey. Dictators know they have done bad things, and fear reprisal and the International Criminal Court. For example, Omar al-Bashir of Sudan is wanted by the ICC. 'So they cling to power, regardless of the cost and consequences.'



Setting Africa free

In their new book *Africa's Third Liberation: The New Search for Prosperity and Jobs*, Greg Mills and Jeffrey Herbst argue that Africans must look for liberation through economic growth. 'If Africa's first liberation was from colonial and racist government, and its second stage involved freeing itself from the tyranny and misrule of many of the liberators, the third stage must involve a change in focus,' they suggest. 'This will require concentrating on economic development to the exclusion of racial, tribal and religious issues that have plagued much of the continent in the past.' The third liberation, Mills and Herbst contend, will enable African citizens to at last set their own agendas.

While many African countries remain in the second stage of liberation, they point out that armed conflict has lessened and democracy has spread; they also chart ways to achieve a third liberation. 'Those countries nimble enough to exploit the real market advantages open to them have the opportunity to lead the rest of the continent to prosperity.'

During more than half a century of post-colonial rule, millions of Africans have been killed, displaced and impoverished by poor leadership, lack of rights and the rule of law. It remains to be seen whether money through economic growth will finally set Africa free. 

Karen MacGregor is a freelance journalist. She can be contacted at editors@africa.com.

Press here to view film of Zimbabwean lawyer Beatrice Mtetwa.



Twenty-first century slavery

As the IBA focuses on human trafficking as a Presidential priority, *Global Insight* explores the second largest criminal industry in the world, highlighting how the legal profession can address an issue that affects more than 600,000 men, women and children every year.

BEN COOK



How many slaves work for you? None? Perhaps you need to think again. Have a look at the website slaveryfootprint.org – which was created by anti-slavery campaign group Made in a Free World – sign up and take the survey. If you have two children, are a homeowner, eat seafood, own a diamond and have a mobile phone, you probably have more than 40 slaves working for you. Pretty shocking, isn't it? If you have carpets in your home, you may be interested to know that, according to the California-based campaigners, 200,000 children are forced to work in India's 'carpet belt' of Uttar Pradesh, an area which, UNICEF says, contributes 85 per cent of India's carpet exports. Perhaps you have a mobile phone in your pocket, your phone has capacitors that are made with coltan, a black tar-like mineral,



of which around two-thirds of the world's supply is mined by children who are forced to toil in mines of the Democratic Republic of Congo (DRC) in Africa. And the tales of human slavery linked to everyday consumer habits continue. Planning to have shrimp for lunch? As you nibble on it, it might be worth thinking about the people forced to work 20 hours a day in Southeast Asia to peel shrimp for the United States market (the biggest consumer of Southeast Asian shrimp). These are bonded labourers who Made in a Free World say are 'under constant threat of violence or sexual assault' if they attempt to escape.

If these forms of hidden slavery come as a surprise to you, you are not alone in your ignorance. Gillian Rivers, a partner at London-based law firm Penningtons and Chair of the International Bar Association's Family Law Committee (which presented a showcase on human trafficking at the 2013 IBA Annual Conference in Boston) says that human trafficking – a modern form of slavery, according to charity Anti-Slavery International – is an 'unseen crime'. She adds: 'There are figures where people [who have been trafficked] are known to the authorities but there are hundreds of thousands who are trafficked that are not known to the authorities – it's carried out in our own backyards, but because of the hidden nature, it's difficult to get figures.' Rivers says that people are largely ignorant of the major global infrastructure built on trafficked slaves. 'Some people think it's not relevant to them,' she says. 'But how many slaves do you inadvertently use to maintain your lifestyle? We need to define and highlight the problem.' So, what exactly is human trafficking, what is the scale of the problem, what more can the legal profession do to tackle it and how can you spot the signs that indicate someone has been trafficked?

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines 'trafficking in persons' as: 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.' The protocol adds that exploitation 'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. Furthermore, the protocol states that children 'cannot give consent to being moved, therefore the coercion

or deception elements do not have to be present'.

Now let's look at some statistics. What is the scale of human trafficking? According to the US Department of State, between 600,000 to 800,000 men, women and children are trafficked across international borders around the world each year. According to the department this means

'How many slaves do you inadvertently use to maintain your lifestyle? We need to define and highlight the problem'

Gillian Rivers
Chair, IBA Family Law Committee

that, after drug dealing, 'trafficking of humans is tied with arms dealing as the second-largest criminal industry in the world'. According to the International Labour Organization, human trafficking generates \$32bn annually, while 20.9 million people are victims of forced labour globally – this figure includes victims of human trafficking for labour and sexual exploitation. The UN Office on Drugs and Crime (UNODC) says that 'while it is not known how many of these victims were trafficked, the estimate implies that currently there are millions of trafficking in persons victims in the world'. Three-quarters of all the victims of human trafficking are women and girls (see **boxout p 48**).

Sexual exploitation and forced labour

Is a human trafficking a problem that affects particular jurisdictions? According to the UNODC *Global Report on Trafficking in Persons 2012*, a total of 460 distinct trafficking flows were identified in the period 2007–2010 – the UNODC defines a trafficking flow as the 'line connecting two locations: the origin and the destination of at least five victims of trafficking in cases documented during the reporting period'. The report said that, during this period, trafficking victims of 136 different nationalities were detected in 118 countries around the world. The UNODC report data on the nationality of trafficking victims is based on information provided by 83 countries and relates to 26,700 victims whose nationality was detected. The most common type of exploitation suffered by detected trafficking victims varies depending

on the region – for example, the majority of trafficking victims detected in Europe, Central Asia and the Americas had been sexually exploited, while the most common form of exploitation suffered by victims detected in South Asia, East Asia, the Pacific, Africa and the Middle East was forced labour. The next most common form of exploitation suffered by detected trafficking victims is organ removal. The report also stated that poverty and unemployment are ‘considered to be among the factors’ that make people vulnerable to human trafficking. ‘There is, for example, a positive statistical correlation between the unemployment rates of the Russian Federation and Ukraine and the share of Russian and Ukrainian victims detected in the Netherlands,’ the report said. ‘In addition, Germany recorded a decreasing trend in the share of Russian victims detected, while simultaneously, Russian per capita GDP increased.’

Paul Yates, head of London pro bono at

Freshfields Bruckhaus Deringer, says that, in order to better address the issue of human trafficking, there needs to be better awareness of the problem among members of the legal profession. ‘Human trafficking is not well understood, not everyone knows what it is, and not everyone knows it goes on in the developed world,’ he says. ‘There needs to be general awareness raising among criminal law practitioners, as well as those involved in immigration, social welfare law, family law, and dealing with vulnerable people.’ Yates urges lawyers to become familiar with the indicators of human trafficking. A list of indicators is supplied by the International Labour Organization – for example, an adult trafficked for labour exploitation may say they have had their wages withheld or may have had their documents confiscated. Meanwhile, a child trafficked for sexual exploitation may, for example, have been deceived about their ability to access education or deceived through promises of marriage or

‘Victims of trafficking have suffered serious violations of their human rights – all lawyers could help assist NGOs who work with trafficked people, whether in a pro bono or advisory capacity’

Parosha Chandran
Barrister, 1 Pump Court, London



adoption. Yates also calls on lawyers to do more pro bono work to help in the fight against human trafficking, though he concedes that this could be a challenge because the largest law firms with the most resources ‘don’t tend to have expertise in criminal and immigration law’. He also says law firms can step up the fight against traffickers in labour courts by representing trafficking victims in discrimination or minimum wage-related cases.

A panoply of suffering

One high-profile case involving trafficking victims in the United Kingdom took place in 2009 when four women trafficked to the UK and forced into prostitution sought damages from the couple who trafficked them – the Immigration Law Practitioners’ Association described this as the first ‘known example of litigation on behalf of the victims of trafficking for sexual exploitation directly against their traffickers in the UK’. The case involved four Moldovan women who claimed damages against



Can you do the right
thing if you don't
**know the
right thing?**

Wolters Kluwer Law & Business

Our Antitrust, IP and International portfolios deliver authoritative analysis, primary source materials, and innovative workflow tools designed to inspire and guide the next generation of attorneys. Discover the power of our author community consisting of more than 1,000 professionals covering more than 200 local jurisdictions.



Now Accessible on phone and tablet:
m.KluwerArbitration.com,
m.KluwerCompetitionLaw.com,
m.KluwerIPlaw.com

Visit us at www.kluwerlaw.com



Wolters Kluwer
Law & Business

Mobile phone capacitors contain coltan. Two-thirds of the world's supply is mined by children in the Democratic Republic of Congo.



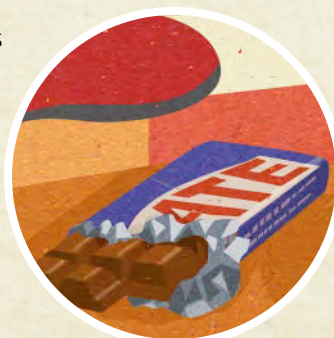
In Southeast Asia, shrimp peelers are forced to work 20 hours a day to meet the demands of the US market.

In the diamond mines of Sierra Leone, thousands of child slaves work without pay.



According to California-based campaigners, 200,000 children are forced to work in India's 'carpet belt' in Uttar Pradesh.

Children are trafficked into cocoa farms in West Africa. Aged nine, Abdoulaye worked on a farm in Burkina Faso: 'We had to get up at 4am and work until 4pm.'



Migrant farm workers from Mexico, Guatemala and Haiti, compelled by economic need to work abroad, become trapped in forced labour.

their traffickers – a married couple called Gavril and Tamara Dulghieru who lived in Tooting, London. The women's claim for damages in the High Court was made on the grounds that they were 'victims of an unlawful conspiracy to traffic them into the United Kingdom from Moldova for the purposes of sexual exploitation and prostitution'. In his judgment – which detailed the disturbing accounts of the trafficked women – Justice Treacy awarded the four women £175,000, £162,000, £132,000, and £142,000 respectively, and said the damages reflected the fact that the women had experienced suffering that included post-traumatic stress disorder, coerced sexual activity, false imprisonment, injury to feelings, humiliation, loss of pride and dignity, and feelings of anger or resentment caused by the actions of the traffickers. With reference to this case, Yates says that trafficking needs to be seen as a human rights violation. 'Human trafficking is a fundamental breach of human rights and the rule of law and it is happening all over the world right under our noses.'

Lawyers should seek to bring legal challenges to enable the development of law and policy for the protection of trafficking victims, according to Parosha Chandran, a barrister at 1 Pump Court in London. 'There is very little case law in this area and there needs to be a drive to develop it,' she says. 'We need to protect victims of trafficking in terms of their immigration, welfare and criminal justice needs.' Chandran adds that the protection of victims of trafficking will facilitate the prosecution of the perpetrators. 'If the vulnerability of victims of trafficking is recognised and if they are treated with care and respect for their needs – such as durable access to recovery because there is a lot of trauma-related suffering involved – they are more likely to give evidence because they are extremely frightened of traffickers and have no legal status.'

Chandran recently acted for two of the four successful appellants in a landmark UK Court of Appeal case that concerned people who had been trafficked to the UK, forced to cultivate cannabis by their traffickers, and then imprisoned for the crime of cannabis cultivation. The Court of Appeal quashed the convictions of the four appellants on the grounds that their crimes were a manifestation of their trafficking and exploitation. Anti-Slavery International described the case as a 'milestone in making sure that victims of trafficking are protected against criminalisation'.

Yasmin Waljee, International Pro Bono Manager at Hogan Lovells, emphasises that trafficked people should be 'treated as victims rather than criminals'. However, she adds that

one of the legal barriers to trafficking victims being compensated in the UK is the limitations of the Criminal Injuries Compensation Scheme. For instance, the scheme states that any claim for compensation should be made within two years of the relevant incident, but Waljee argues that trafficking victims 'can't cooperate with the police if they don't feel settled in their immigration status because they may be afraid of [being reported] to the authorities'. She adds: 'If they have a settled immigration status, they can be supported to make an application.' Waljee says there is a general lack of knowledge of the Criminal Injuries Compensation Scheme, and that its effectiveness may also be limited by the fact that lawyers do not get paid for the work involved.

Recent legal developments have created the basis for the legal protection of trafficking victims, according to Chandran. In particular,

*'Seventy per cent of victims
Hope for Justice helped
last year wouldn't qualify
for legal aid under the
[residence test] changes'*

Rebecca Clarke
Campaigns Officer, Hope for Justice

Women and girls bear the brunt of the suffering

Three-quarters of human trafficking victims are women and girls. Around 60 per cent of the victims of human trafficking between 2007 and 2010 were adult women, according to the UNODC *Global Report on Trafficking in Persons 2012*. This figure is based on data for 29,000 victims detected during that period where the age and gender profile was known and reported. The UNODC report said that analysis of the data for 2009 reflected the age/gender patterns for the whole period covered by the statistics – in this year, 59 per cent of trafficking victims detected globally were women, 17 per cent were girls, 14 per cent were men and 10 per cent were boys. So, in total 76 per cent of the victims were female.

The report also concluded that the trafficking of children 'appears to be increasing'. Of the detected victims whose age profile was known and reported in the period 2007–2010, a total of 27 per cent were children, up from 20 per cent in the period 2003–2006. The proportion of detected trafficking victims who are children varies from region to region, according to the UNODC report. For the period 2007–2010, European and Central Asian countries reported that 16 per cent of detected victims were children, but in Africa and the Middle East, children accounted for approximately 68 per cent of detected victims.

Roughly two-thirds of the people prosecuted for and/or convicted of trafficking are men, the UNODC report concluded. This conclusion was based on information from 'more than 50' countries. It added that, although the majority of trafficking offenders are men, women are more commonly prosecuted and convicted for trafficking offences than for most other crimes. The report stated that most countries report overall female offending rates of fewer than 15 per cent of the total for all crimes – with an average of around 12 per cent – but 30 per cent of people trafficking prosecutions and convictions are of women offenders. 'Statistical analyses show that the involvement of women in trafficking is more frequent in the trafficking of girls,' the report said. 'Qualitative studies suggest that women involved in human trafficking are normally found in low-ranking positions of the trafficking networks and carry out duties that are more exposed to the risk of detection and prosecution than those of male traffickers.'



‘Human trafficking is a fundamental breach of human rights and the rule of law and it is happening all over the world right under our noses’

Paul Yates

Head of London Pro Bono,
Freshfields Bruckhaus Deringer

she highlights the European Union Trafficking Directive that came into force in April 2013. The directive states that victims of trafficking in human beings should be protected from prosecution or punishment for criminal activities – such as the use of false documents or offences under prostitution or immigration legislation – that they have been compelled to commit as a consequence of being trafficked. ‘The directive is very clear about the legal rights of victims of trafficking,’ Chandran says. ‘Victims of trafficking have suffered serious violations of their human rights – all lawyers could help assist NGOs who work with trafficked people, whether in a pro bono or advisory capacity.’

With regard to the UK, the government’s proposed changes to the legal aid system – whereby it currently provides funding for legal services to those who cannot afford them – would stop many victims of human trafficking from getting access to justice, according to Rebecca Clarke, Campaigns Officer at anti-human trafficking charity Hope for Justice. The proposed reforms would mean that, to be eligible for legal aid, a person would have to be lawfully resident in the UK at the time of the application and for 12 months previously. Clarke says: ‘Seventy per cent of victims Hope for Justice helped last year wouldn’t qualify for legal aid under the [residence test] changes.’ She echoes Chandran’s call for lawyers to help tackle the problem of human trafficking by ‘taking the opportunity to provide pro bono expertise to [anti-trafficking] charities’.

Despite human trafficking being a global phenomenon, there is a great deal of ignorance about the issue, and lawyers are urged to educate themselves about this crime and offer their expertise on a pro bono basis to assist organisations helping victims. We should also take some time to think about the people we encounter in our communities, according to Walgee. ‘We need to be aware of who is serving us and how they are being treated,’ she says. In the UK, it seems the issue of legal aid will form one of the key battlegrounds in the fight against human trafficking. In its response to the government’s proposed changes to legal aid, the Anti Trafficking and Labour Exploitation Unit (ATLEU) – a not-for-profit organisation that provides legal representation to victims of trafficking – argued that the changes would exclude from legal aid migrants who ‘through no fault of their own’ have illegally entered the UK. It added that the reforms would also mean legal aid would be unavailable to migrants who have escaped their traffickers and who have meanwhile become overstayers, as well as migrants whose immigration status cannot be determined, because ‘their traffickers or violent spouses’ have possession of their documents. Jamila Duncan-Bosu, a lawyer who co-founded ATLEU, says: ‘The legal profession needs to bring pressure to bear on the government, this is perhaps the biggest threat to the ability to assist victims of trafficking.’

Ben Cook is a freelance journalist. He can be contacted at ben.cook@hotmail.com.



View film of IBA showcase on Human Trafficking from the 2013 IBA Annual Conference in Boston; and

Interview with UN Special Rapporteur on Trafficking in persons, Joy Ezeilo.



UP TO 6
CPD/CLE
HOURS
AVAILABLE

17th Annual IBA International Arbitration Day Advocates' Duties in International Arbitration: Has the Time Come for a Set of Norms?

13–14 February 2014

Maison de la Mutualité, Paris, France

A conference presented by the IBA Arbitration Committee, supported by the IBA European Regional Forum

Welcome and opening remarks will be addressed by **Christiane Taubira**
Garde des Sceaux, current Minister of Justice of France.

SESSIONS INCLUDE:

- Anything goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?
- The gathering and taking of evidence: should we seek to level the playing field?
- Arbitrators without powers?
- *The IBA Guidelines on Party Representation*: the right step or a step too far?
A debate.

WHO SHOULD ATTEND?

Lawyers in private practice, lawyers in government and public bodies, in-house counsels, SME executives involved in international business activities, and academics.

HEADLINE SPONSORS



REGISTER BEFORE 3 JANUARY TO RECEIVE THE EARLY BIRD DISCOUNT AT
WWW.IBANET.ORG/CONFERENCES/CONF506.ASPX

Poverty post-financial crisis: the rule (and role) of law



Warnings of rising poverty in developed countries, negotiations for a new global agenda to follow the UN's Millennium Development Goals, and the need for new systems of governance and regulation after the financial crisis mean there has never been a more pressing time for the legal profession to re-envision their role in fighting global poverty. The second phase of the IBA's Task Force on the Financial Crisis has done just this, culminating in the book-length report launched at the IBA Annual Conference in Boston, *Poverty, Justice and the Rule of Law*.

HANNAH CADDICK

In October this year, the Red Cross launched a food aid campaign for the United Kingdom's poor. It is the first such campaign since the Second World War and comes after its latest report found the number of people in Europe depending on Red Cross food distributions had increased by 75 per cent following the global financial crisis (GFC) of 2008.

The campaign is a stark reminder that the GFC has been, and continues to be, a very human crisis. It has deepened social and economic inequality, made the world's poor even poorer and propelled many more into poverty. And it is not only a problem for developing countries: across the globe, we have seen job losses, housing crises and food shortages.

In the Red Cross report, Anitta Underlin, Director of the organisation's Europe Zone, said it was 'time to think differently'. 'There is still hope, but it will take much more than bailing out banks and distributing food aid to turn things around.'

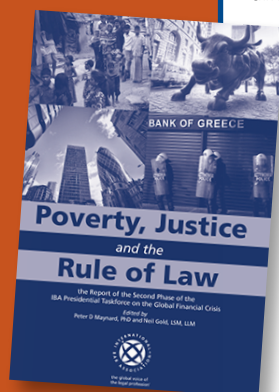
The expiry of the Millennium Development Goals in 2015 is the perfect opportunity to set a new global poverty agenda and, in the hiatus between the GFC and a much-anticipated return to 'business as usual', there is an opportunity for lawyers, as a collective of influential actors, to re-envision their role in sustainable recovery and poverty reduction.

Poverty, Justice and the Rule of Law

the Report of the Second Phase of the IBA Presidential Taskforce on the Global Financial Crisis

DOWNLOAD YOUR FREE COPY OF THE REPORT

The 14-chapter report is available to download free of charge, in full or by individual chapters, from <http://tinyurl.com/GFC2013>, where you can also read chapter excerpts, find out more about the Task Force and those involved, and watch related filmed content.



WATCH THE FILM

Speaking on the book's central themes are:

Professor of Philosophy and International Affairs at Yale University Thomas Pogge; author of the Millennium Development Goals Mark Malloch Brown; and contributors to the book, Nobel laureates Muhammad Yunus and Joseph Stiglitz.

LEARN MORE

<http://tinyurl.com/GFC2013>

Wellbeing of the people through law

In 2012, IBA Past President Akira Kawamura commissioned a second phase of the IBA's Task Force on the Financial Crisis to examine the effect of the GFC on poverty, employment, welfare and good governance.

Initially established in 2009 to look at the regulatory failures and structural weaknesses of the financial system which contributed to the crisis, the second phase aimed to 'assess and, to the extent feasible, through law reform and legal services provisions, remediate the causes that have led to the hardships encountered by those living in poverty'.

In producing its report, the Task Force worked closely with leading lawyers and authorities on the issues including four Nobel laureates – microfinance pioneer Muhammad Yunus, and economists Amartya Sen, Joseph Stiglitz and James Heckman. The issues and approaches captured are intended to help legal practitioners and those who interpret their efforts in promoting global development and combatting poverty.

Introducing the report, editors Peter Maynard and Neil Gold suggest that 'lawyers everywhere share the professional value of responsibility for implementing the rule of law.' The report explores this premise, arguing strongly that this responsibility 'transcends providing client service and preventing clients from engaging in illegal conduct to encompass a commitment to ensuring that the law contains robust rights, including those that alleviate poverty and secure economic development.'

The rule (and role) of law

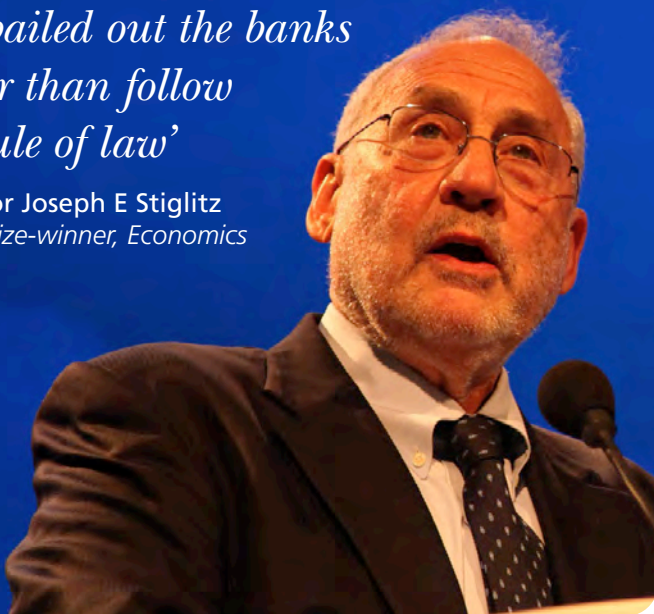
The banking misdemeanours that contributed to the financial crisis of 2008 have put rule of law centre-stage in debates about financial practice. The recklessness of bankers and collusion in rate-fixing may not only be a matter for the financial regulators but one for the law.

As far as Nobel Laureate for Economics Joseph Stiglitz is concerned, in bailing out the banks, governments have themselves undermined the rule of law. Speaking to the IBA in a recent interview, he explained, 'we had laws to deal with banks that could not meet their financial obligations... we have a process called conservatorship... we [had in place] laws to deal with the problems of Citibank. And we walked away; we bailed them out rather than follow the rule of law.'

And who, argues Stiglitz, should be more concerned about upholding the rule of law than lawyers themselves?

*'We bailed out the banks
rather than follow
the rule of law'*

Professor Joseph E Stiglitz
Nobel Prize-winner, Economics



Banks for the rich

Bankers have been vilified for their role in the GFC – lending money to ‘sub-prime’ borrowers with poor credit histories (and little or no chance of repaying what they owed) and chasing high-risk investments with leveraged funds. Regulators too, have come under fire for failing to keep financial institutions and their activities in check, while credit ratings agencies have been exposed for awarding inflated triple A scores.

For microfinance pioneer and Nobel Peace Prize-winner Muhammad Yunus, the problem is a systemic one. His moniker ‘banker for the poor’ reveals less about his Grameen Bank than it does about the structures of the banking system in most of the developed world: ‘conventional banks – even after 35 years of microcredit all over the world – still could not open their doors to the poor because their system doesn’t allow them to.’

In his contribution to the report, Yunus tells the story of his Grameen Bank, and discusses the potential of microfinance to alleviate poverty by providing funds to those who cannot access them through conventional financing systems. These funds can then be used for income-producing activities, housing and education.

He argues that we need to create ‘a separate banking system, a separate breed of bank’, and this is where lawyers have a part to play; speaking to the IBA in a recent interview, he explains, ‘The law creates the bank for the rich... you need a different kind of legal framework to create a bank for the poor’ (see boxout pp 56–57).

The austerity burden

Across Europe the chosen antidote to pre-GFC spending, speculation and recklessness, has been austerity. Governments, desperate to reduce their budget deficit, have in some cases – such as Greece – had no choice but to enforce austerity measures, slashing expenditure. In Chapter 1 of the report, Jan Loorbach Marius and Job Cohen note that the GFC has put pressure on those with governmental responsibilities to ‘make governing more efficient’; they also raise the concern that, ‘when moral principles are sacrificed on the altar of efficiency, the basic values of our society are threatened.’ For Stiglitz, austerity measures are not necessarily an efficient means to recovery either. Job losses mean increased reliance on the state and lower tax revenues through employment and tax on goods and services; ‘The evidence is overwhelming,’ he argues: ‘austerity is going to deepen the downturn.’

Shelley Marshall, senior lecturer at the University of Monash, suggests in her chapter of the report that the reason austerity is being chosen over other policies ‘is due to the dominance of financial markets. So much economic policy today is focused on “restoring

*‘In times of financial crisis,
those with governmental
responsibilities are seeking
measures to make governing
more efficient [... But]
when moral principles are
sacrificed on the altar of
efficiency, the basic values of
our society are threatened’*

Jan Loorbach and Marius Job Cohen
‘Poverty and the Law’, Poverty, Justice and the
Rule of Law

confidence in the markets”, yet, as Wolfgang Streeck has recently commented, it is now impossible to restore the confidence of the financial markets and the majority of citizens at the same time.’

‘Corporate governance and responsibility, labour and employment law, pro bono activities, the empowerment of women and vulnerable groups, and the rule of law are part of the “day job” of business lawyers and the daily aspirations of the law for everyone’

Peter Maynard and Neil Gold
‘Introduction’, Poverty, Justice and the Rule of Law

Labour law and employment

One area undisputedly affected by austerity measures is employment. Marshall’s chapter sets out the argument that labour is shouldering the burden of the GFC – and unfairly so when no commentary or analysis has suggested this is where the origins of the crisis lie.

She writes: ‘Given that inequality is seen by some to be a cause of the crisis, and increased inequality has certainly been an outcome of the crisis, measures should be put in place to increase equality. Labour law is an important tool for reducing inequality, and if designed appropriately, this can occur in a reflexive and responsive manner. Instead, conditionalities currently associated with EU bailouts are likely to intensify long-term unemployment and inequality rather than reduce it.’

Marshall argues that pro-growth policies instead of austerity measures are needed, but that individual countries lack the incentive to do this: ‘Rather than expect individual countries to make stands of this nature, in the knowledge that they risk demoted Standard & Poor’s ratings, capital flight and sustained litigation, it would be simpler to put in place international and global policies and institutions that promote global economic stability.’

‘Justice for all’

Reduction in government spending has also meant a scaling down of legal aid in many

countries. In the UK this year, changes made by the government to civil legal aid have meant that some types of case are no longer eligible for public funds – including divorce, child contact, welfare benefits, employment, clinical negligence, and housing law (except in very limited circumstances).

Cuts to legal services are likely to increase numbers of litigants in person. Former Chief Justice of England and Wales, Lord Woolf, cautioned earlier this year that this could put pressure on the system by clogging up the courts and increasing costs. The basic tenet of professional responsibility for those practising law is surely to ensure its rules – and the notion of justice – are upheld. According to Joseph Stiglitz, ‘The legal profession has to insist that there is access to justice for all’. In his keynote speech at the 2012 IBA Annual Conference in Dublin, which features in the final chapter of the report, Stiglitz presented access to justice as one of three recommendations to the legal profession in formulating their response to the GFC.

The welfare state

Part of the debate which contextualises access to justice is the viability of the welfare state. ‘The case for the welfare state’ says Nobel laureate James J Heckman, ‘is that it protects its citizens against the consequences of risks beyond their control. The case against the

welfare state is that it blunts incentives and reduces productivity. Supporting this point of view is that the economic performance of many welfare states has been poor.' In his chapter of the report, which explores the welfare state in a world post-GFC, Heckman stresses, 'Not all welfare states have lagged, or at least they have not all lagged in the same way' and therefore there are still valuable lessons to be learned and possibilities for restructuring a welfare system.

'The legal profession has to insist that there is access to justice for all'

Professor Joseph E Stiglitz
Nobel laureate for Economics in his
keynote address at the IBA Annual
Conference 2012, Dublin

For Heckman, 'The key to a successful welfare state lies in devising proper incentives to encourage actors at all levels of the economic system to respond to the new opportunities.' The Nobel prize-winner believes that, in principle, it is possible for a welfare state to 'provide the proper incentives for productivity and at the same time afford a measure of security and dignity for its citizens. But it has to respect incentives.'

Banks for the poor

Incentivisation is, for Yunus, essential to sustained poverty reduction and this, he argues, is inbuilt in microfinancing (see **box pp 56–57**). His Grameen Bank is based on trust and positive incentives of continued access to credit, no legal documents necessitating collateral and regular meetings between borrowers and lenders to encourage a sense of responsibility. The successes of the bank are numerous, but perhaps most simply illustrated by the fact that the repayment rate is 98 per cent and the bank is 96 per cent owned by borrowers.

In his chapter of the report, he provides nine ways in which lawyers can not only relieve the effects of poverty, but help lower-income people take care of themselves, now and for the future, across the world. 'The change lies in believing and investing in people and their ability to change their own lives,' he argues. 'All people, including the poor, have enormous capacity to help themselves.'

International pro bono

Lawyers already have a tradition of contributing their skills and influence for the public good – to 'help people help themselves' – through pro bono activities. 'There is no doubt,' says John Corker, Director of the National Pro Bono Resource Centre, that 'through a myriad of institutional, agency and law firm initiatives, pro bono legal services have supported important responses to support communities and individuals as they face the challenges of financial crises and poverty.'

'Law firms have the knowledge and skills to draft laws, prepare guides, toolkits and other legal materials,' explains Corker in Chapter 3 of the report, 'and to deliver training and represent individuals or groups of individuals whether it be, for example, to assist persons to seek compensation, or in relation to immigration laws'.

And there is the potential for even greater social gain through pro bono; the practice has undergone a huge transformation in the last two decades, from ad hoc, individual activities, to coordinated, structured activities on an international level. By seeing pro bono as part of a bigger picture, structuring approaches and 'coordinating lawyers across a number of firms and in-house corporate lawyers,' says Corker, 'detailed comparative studies of the law and its implementation across multiple countries can be [...] used as an important advocacy tool. Law firms and barristers can also pursue public interest litigation'.

'The key rationale for pro bono is that private lawyers act out of a professional ethical duty to improve access to justice'

John Corker

'The Role for International Pro Bono Work by Lawyers in Addressing the Social Impact of the GFC', Poverty, Justice and the Rule of Law

Drawing upon various case studies, he argues 'the greatest impact that international pro bono can make in the post-GFC world is to provide the broad range of non-litigious legal work that supports and stabilises organisations. It is this stabilisation that can help developing countries be more resilient and grow.'

Muhammad Yunus on how lawyers can provide vital help to encourage and enable lower-income people to take care of themselves in the US and internationally:



Watch an interview with Muhammad Yunus here.

1. *Simpler laws for microfinance programmes.* Everywhere in the world, simpler laws are needed to allow microfinance programmes to receive savings deposits and relend that money.
2. *Laws focused on individual borrowers.* Low-income borrowers find starting and managing a small business can be difficult because laws and regulations either are intended for larger businesses or simply are not essential. This discourages new entrepreneurs and reduces competition.
3. *Waiver medallions for the poor.* Very poor people should be entitled to a sort of 'waiver medallion' that enables them to take care of themselves through self-employment opportunities with minimal or no interference from laws that weren't designed with them in mind.
4. *Welfare and Medicaid laws designed to encourage independence.* Welfare and Medicaid laws often too steeply limit how much a low-income person can save or earn. Creative policy

CSR: the new norm

Earlier this year, *Global Insight* covered the news that four magic circle law firms may have human rights policies in place by the end of the 2013 – making them the first law firms in the world to do so (see **Law firms to draw up first human rights policies by end of year** by Rebecca Lowe). The firms are drawing up policies in line with the Guiding Principles on Business and Human Rights, proposed by then-UN Special Representative John Ruggie and endorsed by the UN Human Rights Council in June 2011. Herbert Smith Freehills partner Louise Moore who leads the firm's sustainability group says, 'Today's lawyers are highly idealistic and astute, and believe it is possible to achieve business ends without sacrificing human rights'.

Leading academic Birgit Spiesshofer MCJ, of New York University in Berlin, discusses the growing trend in corporate social responsibility (CSR) in her chapter of the report. She notes,

'The GFC disclosed the destructive side of capitalism... and triggered a broad international discussion [...] not confined to the financial sector and the First World, but encompassing business operations worldwide.' This growing momentum in CSR should not, however, be taken for granted; the principles put in place must be specific, clear-cut and robust if they are to be in anyway meaningful. For Spiesshofer, the potential is huge: 'If the CSR concept is developed in a realistic and efficient way it can improve working and living conditions in the long run everywhere, including the poorer countries, and alleviate poverty.'

Global justice

CSR, good governance, pro bono and representation of the vulnerable are all integral to maintaining rule of law. They are not, as Peter Maynard and Neil Gold advocate in the report,

changes should be put in place to help people help themselves and to lose these subsidies gradually rather than all at once.

5. *Simpler laws for the poor.* Laws should be kept as simple as possible for people with a low income, in particular to motivate them to take the next steps to help themselves.
6. *Non-governmental loan programmes.* It's extremely difficult for a political entity to recover money it has loaned to poor people [...] thus the important discipline of paying back a loan is lost in a government programme. Loan programmes should [therefore] be left to the non-governmental, private sector and social businesses.
7. *Tax laws that encourage social businesses.* Social businesses are designed exclusively to maximise benefits to customers, rather than maximising profits. New tax laws are needed that put social businesses on at least an equal footing with charities.

'The change lies in believing and investing in people and their ability to change their own lives. All people, including the poor, have enormous capacity to help themselves'

Muhammad Yunus

'Lawyers Can Help Us to Win the War Against Poverty', Poverty, Justice and the Rule of Law

8. *Simpler visa, immigration and passport systems.* The current visa, immigration and passport systems worldwide are a great source of frustration and wasted time and resources.
9. *Tariffs and trade barriers that favour the less powerful.* The relatively poor country of Bangladesh has to pay one of the highest tariffs on its textile exports to the US. The goal should be to help poor countries to do more business with rich countries, rather than letting them depend on their foreign aid.

'the mainstays of an activist agenda. Rather, they are part of the "day job" of business lawyers and the daily aspirations of the law for everyone'. These aspirations are part of a wider theme: that of justice. As Nobel laureate Amartya Sen argues in his chapter of the report, the challenge of upholding the rule of law 'is not confined to making sure that the laws, as they exist, apply to all and are followed by all[:]; we must also take on board the need to scrutinise a sense of comprehensive justice.'

This notion of comprehensive justice is not, for Sen, based on a transcendental theory of justice alone, but on the need for a 'just society'. In the contemporary world where we are increasingly interconnected, the notion of a 'just society' is, in itself, evermore complex. Using the example of Adam Smith and Condorcet and their arguments for the abolition of slavery or free public education for all, Sen advocates a comparative study of justice: 'They [Smith and Condorcet] were not claiming that these

changes would make the world perfectly "just", but only more just in an identifiable way, than the world they saw around them'.

Despite the complexity and challenges posed by a global 'society', Sen argues that this interconnectedness 'offers much greater opportunity of learning from each other.' With the resources we have available to us 'it seems a pity to try to confine the theorisation of justice to the artificially imposed limits of nation states,' says Sen. Put simply by Martin Luther King Jr in 1963, 'Injustice anywhere is a threat to justice everywhere.'

In striving to get back to 'business as usual', consideration of this global society, its challenges and injustices must be borne in mind, but so too should the potential it affords us for finding new and better ways to achieve a society that works for all, and not for the very few. ☼

Hannah Caddick is Junior Content Editor at the IBA and can be contacted at hannah.caddick@int-bar.org.

How serious is Asia about competition law?



Most countries across Asia have substantive competition legislation, but serious gaps remain, notably in Hong Kong. Lack of pan-Asian harmony is forcing companies to adopt a country-by-country approach.

STEPHEN MULRENAN

In late October, Hong Kong tycoon Li Ka-shing scrapped a plan for his conglomerate, Hutchison Whampoa, to sell one of its cash-cows: the 'ParknShop' supermarket chain. The decision not to sell followed a strategic review with advisers Goldman Sachs and Bank of America Merrill Lynch, in which it was concluded that the deal 'at this time would not deliver maximum value' to shareholders. In so-doing, Asia's richest man switched his attention to accelerating his growth strategy in Mainland China, but he also took the spotlight away from Hong Kong's nascent competition law landscape just as it was facing increased scrutiny.

Hong Kong resists government intervention

As an economy that prides itself on being among the freest in the world, Hong Kong has an uneasy relationship with the idea of government intervention in any form that might ultimately discourage investor confidence. Lately, however, there has been a growing school of thought that not all segments of Hong Kong society are benefitting from the Special Administrative Region's (SAR's) free market model. A recent United Nations (UN) report confirmed that the city has the worst income disparity of all developed economies, with one in five households living below the poverty line. And

new chief executive Leung Chun-ying won last year's election largely on a campaign to address such social inequality.

When Hong Kong's Legislative Council voted to enact the Competition Ordinance (CO) in June 2012, Hong Kong became the last developed economy to introduce a competition law. While the new law makes anti-competitive behaviour illegal, giving the government power to punish companies for acting against free and fair competition, the timetable since the CO was adopted has dragged. For example, it took almost a year for the government to appoint 14 competition commissioners – in May 2013 – while the new regulator still has no staff, no offices and no website. Enforcement operations are not now expected until mid-2015, which will be a full three years after the law was passed.

Marc Waha, a registered foreign lawyer with Norton Rose Fulbright in Hong Kong, says that the delay is partly due to pragmatic reasons, with the new government facing lots of challenges. 'Those officials that had been in charge of promoting the legislation are gone, therefore there's an expertise gap,' he says. 'These are mundane matters but they do affect timing.'

The proposed sale of ParknShop, which operates 345 stores across Hong Kong, China and Macau, was expected to fetch up to US\$4bn. Prospective bidders included retailers such as state-owned China Resources Enterprise, Japan's

Aeon Co and Australia's Woolworths. ParknShop generated HK\$21.7bn in revenue last year, and is one of the two dominant supermarket chains in Hong Kong with a market share of between 30 and 40 per cent. Housing a similar slice of the pie is the Jardines-owned 'Wellcome' chain, while 'Vanguard' sits in third place with around eight per cent of the market. A relative newcomer to the supermarket space, Vanguard is owned by China Resources Enterprise. This means that, had Li Ka-shing not changed his mind, a successful bid by China Resources would have propelled it to a position of market dominance. A similar deal in any other developed economy would be subject to severe regulator scrutiny, with the result likely to be some form of asset divestment so as to protect competition. Not so in Hong Kong.

Under the new CO, rules that prohibit the abuse of market dominance do not apply to mergers and acquisitions (other than in the telecoms sector, where it already existed). So, although industry players are forbidden from conspiring to fix prices, they can still obtain and retain market dominance through M&A. Shanghai-based King & Wood Mallesons partner Martyn Huckerby says: 'For those countries that are new to having competition regimes, there is still some sensitivity over what the impact will be. In Hong Kong,' he adds, 'there was a pushback by businesses on having a cross-sector merger control regime.'

Avalanche of competition

Some suggest that Hong Kong's lack of a general merger control regime, particularly in light of the delayed timetable for enforcement of the CO, is evidence of a lack of conviction in the principles of free and fair competition.

Others, such as Huckerby, disagree. 'There has been an avalanche of competition developments across the region, and the introduction of legislation by Hong Kong is a further step forward.'

Certainly the new law will introduce to many sectors of the Hong Kong economy competition law prohibitions not seen before. But these still need to be shaped by court and tribunal decisions, exemptions and guidelines.

And the new law's success will ultimately depend on how well it is interpreted and applied. Whether or not the law increases the competitiveness of Hong Kong, the concern for companies is the imposition of unnecessary regulatory cost and uncertainty. 'A merger control process that is mandatory is clearly seen as a nuisance by the business community,' says Waha. 'They might accept it if it comes from Beijing or the US, but less so from Hong Kong.'

But, while clients dislike clearance regimes and processes that simply add layers of administration and therefore cost, even less appealing is legal uncertainty. 'Either you have a clear power in charge, and it is well organised, or you don't,' says Waha. 'A mandatory merger control process has

been clearly excluded, and therefore the business community is happy as there is legal certainty.' Such certainty also exists in Singapore, which, like Hong Kong, largely modelled its competition legislation on the 1998 UK Competition Act.

But, unlike Hong Kong, Singapore's 2004 Act incorporates a merger control regime albeit a voluntary one. 'Singapore is similar to the UK, Australia and New Zealand in that it is one of the very few civilised regimes where you hold the keys in your hands,' says Waha.

Singaporean regulators are known for being a bit more 'light touch' than their 'interventionist' counterparts in Hong Kong. And some M&A participants have taken advantage of this by choosing not to notify the Competition Commission of Singapore (CCS) of an impending deal. The majority of CCS decisions have simply followed those of other, 'more important' competition authorities, so companies avoided loading their deals with additional cost.

Perhaps frustrated at not having the powers of other authorities, and encouraged by those law firms that expected to have more work in merger filings, the resource-stretched CCS has in the last year published new guidelines on when companies need to file.

Time to unwind

The conclusion to be drawn from the differing regimes in Hong Kong and Singapore is that participating companies in M&A activity care more about legal certainty than the imposition of a general merger control regime. Like Hong Kong, Malaysia also does not house such a regime. Unlike Hong Kong, however, there is no exclusion of mergers in Malaysia, meaning that the Malaysian Competition Commission (MyCC) can consider that a merger agreement is restrictive of competition and challenge the transaction itself. This is in part what it did in its recent decision to fine flag carrier Malaysia Airlines, and the region's leading budget carrier AirAsia, for anti-competitive conduct during a failed tie-up deal.

Indonesia meanwhile operates something of a hybrid between a mandatory and voluntary regime – a sort of post-closing mandatory regime. In practice, this means that parties to a deal may subsequently be told by the authorities that their successful transaction is subject to review, and may even have to be unwound. With many countries around the region recently updating their competition legislation, the legal landscape facing companies is changing fast.

Following a number of incidents, China has seen a significant ramp-up in enforcement activity across industry sectors such as automobiles, gold and jewellery, and pharmaceutical.

There have been significant fines imposed by the Korean Fair Trade Commission (KFTC) as it too seeks to ramp-up its enforcement activity. At

a recent two-day Association of Southeast Asian Nations (ASEAN) competition conference, Singapore's trade and industry minister, Lim Hng Kiang, called for ASEAN countries to rationalise the competition laws of each member state in order to combat the rise of potential cartels and improve the region's competitiveness.

ASEAN countries want to follow the example of the European Union and allow goods to flow freely between countries in a single market by 2015.

They have been inspired by the perceived benefits of single market member states introducing competition law with EU provisions in mind, and cited the greater consistency this brings in enforcement activity. CCS director of legal and enforcement Jwee Nguan Lee says: 'If you look at Europe and the US, the largest fines are for competition breaches.' Earlier this year, for example, EU regulators fined Microsoft US\$731m for failing to uphold the terms of a 2009 antitrust settlement. And Apple and Google are two other high profile tech companies that have faced EU antitrust scrutiny in 2013. But just how realistic are calls for harmonisation, or rationalisation, in a region with such diversity?

The International Competition Network (ICN) has said that it would like to play a role in bringing about some degree of harmonisation. And Waha argues that there is already very strong common ground across the region, with approximately 80 per cent of competition law – in jurisdictions such as China, Hong Kong, India, Malaysia, Singapore and Thailand – inspired by the EU.

'You might be extremely surprised to see how harmonised the rules already are in areas such as corporate and tax,' he says. For example, Articles 101 and 102 of the EU Treaty – which address the prohibition of cartels and prohibition of abuse of a dominant position, respectively – are already used right across Asia. And the third pillar of competition law principle – merger control – can be found in 95 per cent of Asian jurisdictions. 'The tool-kit is the same but what differs are the policy objectives and what you do with the tool-kit,' says Waha.

While some jurisdictions, such as China, are focused on allowing their domestic firms to thrive, others, such as Indonesia, Malaysia and Thailand, see the role of the competition authority as one that protects smaller players against the larger players. Given that some countries in the ASEAN region have very low standards of living when compared to a Japan or a Korea, Waha questions whether the harmonisation of policies would actually then be desirable. 'The tool-kit allows for quite a lot of flexibility,' he says. 'The challenge for Asia is that it needs to have policies tailored to the needs of local markets and local people.'

'A recent UN report confirmed Hong Kong has the worst income disparity of all developed economies [...] And new chief executive Leung Chun-ying won last year's election on a campaign to address social inequality'

Tussling with the authorities

If the challenge for businesses operating around Asia is to know where enforcement is strong and not so strong, does Asia therefore require a 'country-by-country' approach? Although the region is one of extreme diversity, there is nothing to stop companies from putting in place a set of internal competition law principles. 'If you're engaged in a tussle with the regulators, then you lose the opportunity to use these resources to build up your business,' says CCS director Lee. 'It's therefore critical to have a competition compliance policy.'

However, the size of an organisation and the industry sector in which it operates will often heavily influence a company's commitment to such a policy. For example, Xilinx is a provider of 'All Programmable technologies and devices' and houses approximately 3,000 employees. 'We are aware of the fact that we're in a niche area and so we're very focused,' says Asia Pacific & Japan legal director Sue Lynn Neoh. 'We have to have a 'one-size-fits-all' programme because we're not a large company.' In contrast, Anglo Australian multinational mining and petroleum company BHP Billiton has approximately 150,000 employees. 'Our challenge is diverse geography and product,' says senior antitrust counsel Martin Commons. 'We have to assess the risks of each product in each jurisdiction.'

To address such disparity, both the Asia-Pacific Economic Cooperation (APEC) and the International Chamber of Commerce (ICC) are looking to introduce standard competition compliance across the region. Ever fewer jurisdictions across Asia – including Bhutan, Brunei, Laos, Macau and Myanmar – have failed to introduce substantive competition legislation. The Asia Pacific region is clearly serious about nurturing free and fair competition. 'There are now an increasing number of countries that are actively enforcing competition law,' says Huckerby, 'and this is what has highlighted the differences around the region.' ☒

Stephen Mulrenan is a freelance journalist based in Hong Kong. He can be contacted at stephen@prospect-media.net



UP TO 7.5
CPD/CLE
HOURS
AVAILABLE

Corporate Governance – Recent Trends and Developments

16–17 January 2014

Raffles Hotel Singapore, Singapore

A conference co-presented by the IBA Capital Markets Forum and IBA Corporate and M&A Law Committee, supported by the IBA Asia Pacific Regional Forum

Trade liberalisation has removed barriers between countries, allowing corporations to pursue worldwide business opportunities.

As investor involvement intensifies, the demand for better corporate governance to achieve higher levels of trust and confidence increases. Poor governance can also lead to market instability, as witnessed during global financial crises.

Singapore, a key connectivity hub in Asia, is the venue for the inaugural IBA Corporate Governance Conference. Presented jointly by the Capital Markets Forum and the Corporate and M&A Law Committee, supported by the Asia Pacific Regional Forum, this conference aims to examine prevailing corporate governance and regulatory issues in key economic continents. It will highlight best practices and strategies for public and private companies as well as address specific issues relevant to shareholders and directors.

The conference also aims to give legal professionals an understanding of the value and advantage of IBA. As the largest association of legal professionals, members gain access to essential legal expertise and networking opportunities, which forms a strong foundation for various activities.

Topics include:

- Corporate governance – recent trends in the US, Europe and Asia: are regulations imposing more duties on board of directors?
- Executive compensation – what should be the role of shareholders?
- The role of investors in corporate governance – how will investors add value at the board level?
- Management of risks – whose responsibility is it?
- Effectiveness of board – composition, skills, diversity, proportion of independent directors: do these matter?
- M&A/takeover defence – the role of directors

Who should attend?

Legal professionals, directors, board committee members and shareholders who would like to keep abreast of corporate governance and regulatory issues.



the global voice of
the legal profession

London

São Paulo

Seoul

The Hague

Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org



CPD/CLE
HOURS
AVAILABLE

3rd IBA/CIOT Current International Tax Issues in Cross-Border Corporate Finance and Capital Markets

10–11 February 2014

Holborn Bars, London, England

A conference presented by the IBA Taxation Section and the Chartered Institute of Taxation European Branch, supported by the IBA European Regional Forum

Topics will include:

- Challenges facing cross border corporate finance and capital markets
- Alternative non-treaty attacks on cross border intercompany debt
- Debt-equity characterisation issues
- Transfer pricing for financial instruments and financial institutions
- Intergovernment reporting, information gathering and coordination
- Funds industry – tax treatment of collective investment vehicles (limited partnerships, trusts, offshore funds without legal personality), AIFM directive for the European Fund Industry
- Current issues for financial institutions
- Aircraft financing and other securitisations
- Capital markets update
- Cross border investment in distressed securities and debt
- Financing and structuring considerations for sovereign wealth and tax exempt fund
- Impact of BEPS report and other changes on existing structures and proposed commercial transactions

Who should attend?

Tax, corporate, finance and banking lawyers, accountants, bankers and economists.



Chartered
Institute of
Taxation
Excellence in Taxation



the global voice of
the legal profession

London

São Paulo

Seoul

The Hague

Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org